



**QUARTERLY REPORT
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The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcdowel@doe.in.gov.

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TEACHER-STUDENT SEXUAL ACTIVITY: “AGE OF CONSENT,” “AGE OF MAJORITY,” AND “POWER DISPARITY”

By Gregory A. Chandler¹

Introduction: In the majority of states, it is not illegal for an educator to have a sexual relationship with a student, provided that the student has reached the age of eighteen.² That educators can use their positions of authority to coerce eighteen-year-old students into sexual relationships has led to a fair amount of criticism. To that end, the legislatures in eight states have criminalized all educator-student sex, irrespective of the student's age.³ Proponents of such legislation have cited the coercive nature of the teacher-student relationship as a chief reason why the other forty-two states should follow suit. Implicit in this argument is the notion that students cannot meaningfully consent to sexual activity with adult partners who have a significant amount of control over their educational livelihood and development. Critics argue that this legislation infringes upon important liberty interests, such as the right of adults to engage in private, consensual, noncommercial sexual activity.

Indiana does not have a law specifically precluding school employees from engaging in sexual activity with all students enrolled in or attending the same school. Indiana's current sex-crime legislation may not adequately protect students.

Parts I and II of this article focus generally on the sex-abuse problems in the nation's public and private schools. Specific attention will be given to the high prevalence of sex abuse in schools, as well as the physical, emotional and sociological harms caused by such abuse. Part III summarizes existing statutory rape laws, which presuppose that sexual contact cannot be consensual. It determines that "power disparity" has been an overriding societal and legislative concern in constructing these laws. The thrust of these laws supports the necessity of legislation that will criminalize the activities of educators who engage in sexual relationships with eighteen-year-old students, as well as provide support for preventing educators from engaging in such conduct in the future. It is doubtful whether any student can meaningfully "consent" to sexual activities with his or her teacher.

Part IV surveys some of the case law relating to teacher-student sexual activity. These decisions emphasize judicial concerns related to the power disparity between educators and students. They further provide support for the notion that a teacher-student sexual relationship should never be considered "consensual." As noted, only a few states have enacted laws making it illegal for a teacher to have a sexual relationship with any student, notwithstanding the student's age. Part V of this article will summarize the policies spearheading these laws. More specifically, it will break down the legal challenges that have arisen out of their creation. Lastly, Part VI considers Indiana's existing statutory scheme. This Part addresses whether some amount of statutory intervention is necessary.]

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²In some cases, the student may be younger. A Kentucky legislator recently discovered that a teacher in that State could have consensual sex with a 16-year-old student and not break any laws. J. R. Gray said he would introduce legislation that would criminalize such activity with any student under the age of 18 years of age. "Kentucky Age of Consent Law Disturbs Lawmaker," *Evansville Courier Press* (November 30, 2007).

³*Ark. Code. Ann.* § 5-14-125; *Conn. Gen. Stat.* § 53a-71; *Iowa Code* § 709.15; *N.C. Gen. Stat.* § 14-27.7; *Ohio Stat.* 2907.03; 21 *Okl. St.* §1111; *Tex. Penal Code* § 21.12; *Rev. Code Wash.* § 9A.44.093.

The first time that Kim Wright walked into her high school government class, her teacher Vinson Shipley commented on her appearance. *Ohio v. Shipley*, 2004 Ohio 434, 2004 Ohio App. LEXIS 393 (Ohio App. 2004). Wright, a sixteen-year-old high school junior, soon developed an attraction for the “comfortably outspoken” teacher, looking his number up in the local telephone directory and visiting his home. Inappropriate flirtations soon gave way to a full-fledged sexual relationship. The relationship continued over the next several months, drawing the attention of Wright’s classmates. Wright’s friend and schoolmate testified to an alleged incident in government class during which Shipley exposed himself to Wright with reference to intended sexual activity that evening.⁴ Mr. Shipley continued to take advantage of his authority. During that time, he warned Wright not to tell anyone because of the potential legal implications. He also told her that if he were to go to jail, “he and [Wright] would walk out hand in hand defeating everyone’s purpose because [they] would still end up together.” *Id.* at ¶ 20.

Shipley did in fact go to jail. After the relationship was discovered by the victim’s mother, he was arrested and convicted of sexual battery. (Shipley was also convicted for an illicit sexual relationship with another former student as well.) The conviction came under an Ohio statute providing in part that a “teacher, administrator, coach or other person employed by or serving in a school for which the state board of education prescribes minimum standards” is guilty of sexual battery if the student is enrolled in or attends the school, and if the offender is not enrolled in the school.⁵

Because Wright was sixteen years old, Shipley’s conduct would have been considered criminal in several states.⁶ Had Kim Wright not been a sixteen-year-old junior, but instead had been an eighteen-year-old senior, the age of majority, Shipley’s conduct may not have been criminal conduct in most states, including Indiana, even though his conduct would be considered reprehensible.

The small amount of empirical research that exists on the matter indicates that between 1991 and 2000 as many as 315,000 students a year experienced some sort of physical sexual abuse by a public school employee.⁷ Hofstra University professor Charol Shakeshaft estimated that more than

⁴*Id.* at ¶¶ 28-29 (One of the student’s friends and classmates testified to this occurrence; however, at trial the defendant presented a witness who denied the incident occurred.)

⁵*Ohio Stat.* § 2907.03(A)(7). Shipley, in part, argued that the sexual activity occurred during the summer months and, hence, Wright was not at the time “attending school.” The court rejected this argument, noting that while Wright was not *in* school at the time due to summer vacation, she was still registered and enrolled, had not graduated, had not transferred, or had not left school for any other reason. To accept Shipley’s argument would have “a very ironic effect,” where teachers would not be permitted to engage in sexual activity with student during the school year but could take advantage of the same students during the summer months. “This is not what the statute intends.” *Id.* at ¶ 14.

⁶The age of consent for engaging in sexual activity varies from state to state. Indiana’s age of consent is sixteen (16) years of age. In contrast, Illinois’ age of consent is seventeen (17) years of age.

⁷Dennis Coday, *Uncovering Sex Abuse in Schools Mirrors Church Experience*, **National Catholic Reporter**, (March 26, 2004), available at: http://findarticles.com/p/articles/mi_m1141/is_20070624/ai_115078637

nine percent of all students in grades eight through eleven were targets of educator sexual misconduct at some time during their school careers.⁸

In response, some states have enacted laws specifically targeting educator sexual misconduct. Many of these laws address conduct directed toward students who have reached the legal age of consent (as differentiated from “age of majority”) in that state. However, the majority of states are providing inadequate protection for their high school students who have reached the age of eighteen. Only a small minority of states has made sexual misconduct by school employees a crime, regardless of the student’s age. Indiana is not one of these states.

Indiana may wish to consider a law making it illegal for a teacher, administrator, coach, or other school employee to have a sexual relationship with a student enrolled in the same school, irrespective of the student’s age. Such a law would criminalize Shipley’s conduct even if his victim were eighteen years old.

I. The Sex-Abuse Problem

In a review of existing literature relating to educator sex abuse, Shakeshaft found that the issue “is woefully understudied.”⁹ Scant data exist relating to incidence, and even less exist describing typical predators and targets.¹⁰ This, Shakeshaft argues, is not surprising given that “so little has been done to prevent educator sexual misconduct.”¹¹ Some writers have gone so far as to argue that the rights of adults are being favored over the rights of children.¹²

Shakeshaft found that estimates of the percentage of U.S. students subjected to sexual misconduct by school employees vary from 3.7 to 50.3 percent.¹³ She asserts that the most accurate research as of 2004 indicates that 9.6 percent of all students in grades eight to eleven are targets of educator sexual misconduct during their school careers.¹⁴ These numbers were taken from a 2000 survey of students conducted by the American Association of University Women (AAUW). The study, which surveyed more than 500 public school students, has been applied generally to all public

⁸Charol Shakeshaft, **Policy and Program Studies Service**, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, Prepared for the U.S. Department of Education [hereinafter *Report on Sexual Misconduct*] 21 (2004).

⁹Id.

¹⁰Id.

¹¹Id. at 47.

¹²S.E.S.A.M.E (Survivors of Educator Sexual Abuse and Misconduct Emerge). (1997-2003 and continuing). *Survivors’ Stories: Summary of information from 100 survivors’ responses to S.E.S.A.M.E., Inc.* www.sesamenet.org.

¹³*Report on Educator Sexual Misconduct*, *supra*, at 21.

¹⁴Id.

school students in grades eight through eleven with a ninety-five (95) percent confidence level, Shakeshaft states.¹⁵

A 1993 study by the AAUW gathered data from 1,600 students in grades eight through eleven, focusing on issues from sexual comments to coerced sex. It found that eighty-one (81) percent of the students reported some form of harassment or abuse, mostly by fellow students. Of those who claimed to be targets, eighteen (18) percent said they had been harassed or sexually abused by a school employee.¹⁶ The AAUW findings were cited by *Education Week*, which published a three-part series on sex abuse in schools. The magazine conducted a nationwide search of newspapers and computer databases, finding 244 active cases during a sixth-month period in 1998.¹⁷ These cases ranged from unwanted touching to serial rape and continuing sexual relationships.

Notwithstanding the scarcity of studies relating to the issue, Shakeshaft contends that the existing research reflects a problem of greater magnitude than most realize.

The dearth of existing research makes it difficult to determine whether sex abuse in schools is on the rise, according to *Education Week*.¹⁸ Recently, there have been numerous stories in the media relating to the educator sex abuse problem, although the reporting has been more selective, highlighting cases involving female teachers who have had sexual relationships with their students. Many scholars, including Susan Estrich, feel that this reflects an entirely different problem. Estrich sees a double standard in sex abuse cases. She sees a troubling trend where prosecutors are more likely to pursue cases against male teachers than they are against female instructors. She feels that this ignores the power disparity between teachers and students, demeans male-student sexuality as unworthy of protection, and “provides the basis for ignoring the judgment of the legislature on criminal law.” She further contends that an eighteen-year-old student is “still a child” for the purposes of sex-abuse legislation.¹⁹

Estrich questions society’s attitudes regarding educator sex abuse. Namely, why is it that stories of male teachers taking advantage of female high school students are repugnant, whereas stories of female teachers taking advantage of male high school students are not considered harmful to the students? Estrich asserts that this double standard toward educator misconduct is a primary reason why few comprehensive studies exist.²⁰

¹⁵*Id.* at 19.

¹⁶Caroline Hendrie, *Sex With Students: When Employees Cross the Line*, **Education Week** (December 2, 1998), available at www.edweek.org/ew/articles/1998/12/02/14abuse.h18.html [hereinafter referred to as *Education Week Sex Abuse Study*]. The article was the first of a three-part series published by *Education Week* relating to the problem of sex abuse in schools. The series was titled “A Trust Betrayed.”

¹⁷*Id.*

¹⁸*Id.*

¹⁹Susan Estrich, *Is Teacher-Student Sex OK if the Student is 18?* Available at <http://www.foxnews.com/story/0,2933,200004,00.html>

²⁰*Id.*

Estrich suggests an underlying problem. She believes that legislatures seem not to recognize the inherently coercive nature of teacher-student relationships and the potential for teachers to abuse their power over students. Why would a legislature consider it criminal for a high school teacher to engage in a sexual relationship with a seventeen-year-old student, but enable the same educator to have a sexual relationship with an eighteen-year-old student? The same “power disparity” would exist in both cases.

II. The Effects of Sexual Abuse

Shakeshaft also reviewed the AAUW studies as they relate to the effects of educator sexual misconduct.²¹ Her findings indicate that the targets of abuse suffer emotional, educational, developmental and, physical health effects.

Physical, Emotional and Academic Effects

According to Shakeshaft, at least one-third of the students who were sexually targeted by educators reported behaviors that negatively affected academic achievement.²² These included avoidance of the teacher, absenteeism, avoidance of school, lack of participation at school, inattentiveness, cutting class, and difficulties in studying. Further, approximately twenty-five (25) percent of the students reported academic or disciplinary repercussions that they attributed to the misconduct.²³ These ranged from lower grades to changing schools as well as disciplinary infractions.

Health effects, reported Shakeshaft, included sleep disorders and appetite loss, as reported by twenty-eight (28) percent of the students.²⁴ Additional studies cited by Shakeshaft indicate that victims of sexual abuse suffer lifelong emotional harms, including a loss of trust in adults and authority figures, physical ailments, and lower immune systems, dropping out of school, substance abuse, and difficulty forming intimate relationships.²⁵

Professor Charles Phipps cited a plethora of studies examining the personal and societal effects of short- and long-term abuse, most involving students in their earlier teenage years.²⁶ He noted that abused students may have a greater risk of contracting a sexually transmitted disease such as

²¹*Report on Educator Sexual Misconduct, supra*, at 42-44.

²²*Id.* at 42.

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 42-44.

²⁶Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 *Seton Hall Legis. J.* 1, Part 2, at 83-107.

HIV.²⁷ HIV poses a risk that is more common among older victims because they are more likely to suffer penetrative assault.²⁸ Unwanted pregnancy is an additional concern, Phipps added.

Phipps also cited a study indicating that a close relationship to the offender may be a factor causing more severe physiological effects.²⁹ A teacher-student relationship could be considered a relationship of a “close” nature. However, Phipps’ study seems to indicate that these factors would only be relevant to younger children who have suffered repeated abuse from someone with whom they had a “close” relationship. Phipps stated that these factors are too infrequently researched for definitive conclusions to be drawn.³⁰

Societal Consequences

The societal cost of educator sexual misconduct is alarming. Shakeshaft, for example, found that more than \$18.7 million was paid between 1996 and 2001 to students who were sexually abused by educators.³¹ A *New York Post* study found that 600 legal claims and lawsuits were filed against the New York City public schools in a three-year period at a potential cost of hundreds of millions of dollars.³²

Shakeshaft laments that there are no studies examining the effects on school climate, especially on those who exist in that climate.³³ Studies of sexual harassment in the workplace, however, indicate that the failure to address sexual abuse can be detrimental to the climate and culture of the workplace.³⁴

No studies exist quantifying the specific societal cost of sexual abuse in schools. The National Institute of Justice (NIJ) released a study in 1996 estimating that sexual abuse costs victims and society \$23 billion each year, although these figures are approximations based on conservative

²⁷David Finkelhour & Jennifer Dziuba-Leatherman, *Victimization of Children*, 49 Am. Psychologist 173, 181 (1994).

²⁸*Id.*

²⁹See Phipps, *supra*, at 89-90.

³⁰*Id.*

³¹*Report on Educator Sexual Misconduct, supra*, at 43-44.

³²C. Campanile & D. Montero, *You Pay for School Assaults*, **New York Post** (August 6, 2001) available at <http://pqasb.pqarchiver.com/nypost/access/77075323.html?dids=77075323:77075323&FMT=ABS&FMTS=ABS:FT&type=current&date=Aug+6%2C+2001&author=CARL+CAMPANILE+and+DOUGLAS+MONTERO&pub=New+York+Post&edition=&startpage=006&desc=YOU+PAY+FOR+SCHOOL+ASSAULTS+-+SETTLEMENTS+COST+CITY+%2418.7M+OVER+FIVE+YEARS>

³³*Report on Educator Sexual Misconduct, supra*, at 43-44.

³⁴*Id.*

estimates of abuse.³⁵ According to Phipps, another limitation of the NIJ study is that the estimates are based largely on economic costs endured by the victims.³⁶

Significance of Findings

There is a shortage of quantitative research relating to the emotional, physical, and societal costs of educator sex abuse. In particular, there is a shortage of studies relating to the abuse of older students, including students who have reached the age of eighteen. The findings above are based primarily on the research of Shakeshaft and Phipps. Despite the dearth of research, there are sufficient data to demonstrate educator sexual misconduct can have profound societal and individual implications, warranting legislation action.

III. Statutory Rape Laws

All fifty (50) states have enacted “statutory rape” legislation.³⁷ There is a lack of uniformity among the states, with each state developing its own statutory framework when it comes to sex crimes. Some states more specifically target school employees than others.

Statutory Rape Laws - State Approaches

As noted *supra*, all fifty (50) states have prescribed an “age of consent” at which a girl or boy can legally consent to sexual activity with an adult. Professor Jennifer Drobac has observed that the complexity of the state laws pertaining to sex crimes makes pinpointing a definitive age of consent exceedingly difficult.³⁸

State statutory rape laws, according to Drobac, fail to provide adequate direction as to the age of consent. In particular, these laws reflect legislative decisions based more on moral judgments and less on scientific research regarding the ability of adolescents to provide meaningful consent.³⁹ Some state laws continue to employ archaic terminology, such as those in Massachusetts that require statutory rape victims to be of “chaste” character.⁴⁰ Such archaic terms tend to reflect

³⁵Ted R. Miller, *et al.*, *U.S. Dep’t of Justice, Victim Costs and Consequences: A New Look* (1996) The conclusions as to child abuse were a single component based on an study of the overall cost of crime. Analysis of the societal cost of these crimes included assessment of both the tangible and intangible losses endured by the victims of these crimes.

³⁶See Phipps, *supra*, at 106-107.

³⁷“Statutory rape” involves sexual intercourse between an adult (or child over a certain age but not yet 18 years of age) with a child below a certain age such that the latter child cannot be deemed capable of providing consent to such a relationship.

³⁸Jennifer Ann Drobac, *Sex and the Workplace: “Consenting” Adolescents and a Conflict of Laws*, 79 *Wash. L. Rev.* 471, at 485.

³⁹*Id.* at 485-86.

⁴⁰*Mass. Gen. Laws Ann. Ch. 272, 4*

moral judgments about sexuality that do not adequately consider the psychosocial aspects of the teacher-student relationship.

In 1997, Charles Phipps analyzed state sex crime laws.⁴¹ He found the relationship of victims to the offenders to be crucial.⁴² As of 1997, for example, more than thirty (30) states specifically enhanced penalties or created separate offenses when abuse is committed by a family member or another person who is in a position of authority over the victim.⁴³ This would seemingly indicate that “power disparity” and abuse of authority are of central concern to lawmakers when implementing sex-crime legislation. Given the lack of legislative history available in most states, including Indiana, examination of the language of these statutes will have to serve as evidence of these legislative intentions.

Construction of these laws varies from state to state. In many states, abuse of authority is looked upon as a penalty-enhancing “aggravating factor.”⁴⁴ Other states have drafted statutes making “abuse of authority” an element of an entirely different offense.⁴⁵ Some of these laws are intended

⁴¹See Phipps, *supra*, at 69.

⁴²The statutes referred to in this section were current as of 1997.

⁴³ Alaska Stat. 11.41.434 and 11.41.438 (Michie 1996) (penetration offenses); Alaska Stat. 11.41.436 and 11.41.440 (contact offenses); Ariz. Rev. Stat. Ann. 13-1405 (West Supp. 1997) (penetration and oral contact offenses); Ark. Code Ann. 5-14-120 (Michie 1993) (penetration offense); Ark. Code Ann. 5-14-121 (Michie 1993) (contact offense); Colo. Rev. Stat. 18-3-405.3 (1990 & Supp. 1996) (contact offense); Conn. Gen. Stat. Ann. 53a-71 (West 1994 & Supp. 1997) (penetration offenses); Conn. Gen. Stat. Ann. 53a-73a (West 1994) (contact offense); Fla. Stat. Ann. 794.011 (West Supp. 1997) (penetration offenses); 720 Ill. Comp. Stat. 5/12-13 (West 1993) (penetration offenses); 720 Ill. Comp. Stat. 5/12-16 (West Supp. 1997) (contact offenses); Ind. Code 35-42-4-7 (Supp. 1996) (penetration offense); Iowa Code 709.4 (West Supp. 1997) (penetration offense); Kan. Stat. Ann. 21-3603 (1995) (penetration and contact offenses); La. Rev. Stat. Ann. 14:78.1 (West Supp. 1997) (penetration and contact offenses); La. Rev. Stat. Ann. 14:81.2 (West 1986 & Supp. 1997) (contact offenses); Me. Rev. Stat. Ann. tit. 17A, 253 and 254 (West 1983 & Supp. 1996) (penetration or contact offenses); Me. Rev. Stat. Ann. tit. 17A, 255 (West Supp. 1996) (contact offense); Md. Ann. Code art. 27, 35C (1996) (penetration and contact offenses); Mich. Comp. Laws Ann. 750.520b (West 1991) (penetration offenses); Mich. Comp. Laws Ann. 750.520c (West 1991) (contact offenses); Minn. Stat. 609.342 and 609.344 (Supp. 1997) (penetration offenses); Minn. Stat. 609.343 and 609.345 (Supp. 1997) (contact offenses); Miss. Code Ann. 97-3-95 and 97-5-41 (1994) (penetration offense); Miss. Code Ann. 97-5-23 (1994) (contact offenses); Miss. Code Ann. 97-29-3 (1994) (penetration offense between teacher and pupil); Mont. Code Ann. 45-5-507 (1995) (penetration offense); N.H. Rev. Stat. Ann. 632-A:2(I) (1996) (penetration offenses) and N.H. Rev. Stat. Ann. 632-A:4 (1996) (contact offenses); N.J. Stat. Ann. 2C:14-2 (West 1996) (penetration offenses) and N.J. Stat. Ann. 2C:24-4 (West 1996) (sexual conduct generally); N.M. Stat. Ann. 30-9-11 (Michie Supp. 1996) (penetration offense); N.M. Stat. Ann. 30-9-13 (Michie Supp. 1996) (contact offense); N.C. Gen. Stat. 14-27.7 (1993) (penetration or contact offenses); N.D. Cent. Code 12.1-20-07 (1985) (contact offense); Ohio Rev. Code Ann. 2907.03 (Anderson 1996) (penetration offenses); Or. Rev. Stat. 163.375 and 163.405 (1995) (penetration offenses); S.C. Code Ann. 16-3-655 (Law. Co-op. 1985) (penetration offense); S.D. Codified Laws 22-22-19.1 (Michie Supp. 1996) (incest offense that applies to persons under 21); Tenn. Code Ann. 39-13.527 (Supp. 1997) (sexual contact offenses); Utah Code Ann. 76-5-406 (Supp. 1996) (defines “without consent” as child under 18 and actor is parental figure); Vt. Stat. Ann. tit. 13, 3252 (Supp. 1996) (penetration offenses); Va. Code Ann. 18.2-361 and 18.2-366 (Michie Supp. 1996) (penetration offenses); Va. Code Ann. 18.2-370.1 (Michie Supp. 1996) (contact offense); Wash. Rev. Code 9A.44.093 (Supp. 1997) (penetration offense); Wash. Rev. Code 9A.44.096 (Supp. 1997) (contact offense); W. Va. Code 61-8D-5 (Supp. 1996) (penetration offense); Wis. Stat. Ann. 648.06 (West 1996) (penetration and contact offenses).

⁴⁴*Me. Rev. Stat. Ann. Tit. 17-A 253(2)(F)* (West 1983 and Supp. 1996). *Ark. Code Ann. 5-14-120 and 5-14-121*; *Conn. Gen. Stat. Ann. 53a-71(a)(8)*; *Miss. Code Ann. 97-3-95(2)*; *Ohio Rev. Code Ann. 2907.03(7)*; *Utah Code Ann. 76-5-404.1(3)(h)*.

⁴⁵In some of these states, the applicable offense is actually an incest statute that applies to sexual activity with a relative of the offender under a certain age. See, e.g., [Kan. Stat. Ann. 21-3603](#) (1995); *Mont. Code Ann. 45-5-507* (1995); [S.D. Codified Laws 22-22-19.1](#) (Michie Supp. 1996).

to protect children who have reached the “age of consent” in those states. Indiana is one such example.⁴⁶ Indiana’s child-seduction statute provides in part that it shall be a crime for any child-care worker to “engage in sexual intercourse, deviate sexual conduct, or sexual fondling or touching” with a child at least sixteen, but less than eighteen years of age.⁴⁷ The statute defines child-care worker to include someone who is employed by a school corporation or nonpublic school.⁴⁸ The “abuse of authority” statutes in other states specifically target educators, coaches, counselors and ministers as examples of authoritative positions.⁴⁹ Other states use broader language, resulting in interpretations by the courts.⁵⁰

Abuse of Authority

A cursory analysis of sex-crime legislation indicates that “power disparity” is a concern of policymakers. As stated above, more than thirty (30) states have either heightened penalties or created separate offenses for offenders who have abused a position of trust or authority. This concern is echoed by legal scholars and prosecutors. Michelle Oberman maintains that commentators and criminal justice officials have heightened concerns about statutory rape perpetrators who hold a position of authority over their victims, or who are significantly older than

⁴⁶*Ind. Code* § 35-42-4-7.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹ Me. Rev. Stat. Ann. tit. 17-A 253(2)(F) (West 1983 & Supp. 1996). See also Ark. Code Ann. 5-14-120 and 5-14-121 (Michie 1993) (actor is “an employee in the minor’s school or school district”); Conn. Gen. Stat. Ann. 53a-71(a)(8) (West 1994 & Supp. 1997) (“actor is a school employee and [victim] is a student enrolled in a school in which the actor works”); Miss. Code Ann. 97-3-95(2) (1994) (actor is in a position of trust or authority, including a teacher); Ohio Rev. Code Ann. 2907.03(A)(7) (Anderson 1996) (“teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education provides minimum standards”); Utah Code Ann. 76-5-404.1(3)(h) (Supp. 1996) (sexual contact offense in which actor was in a position of trust, which includes teachers, counselors and coaches).

⁵⁰*Alaska Stat.* 11.41.434(a)(3) (Michie 1996) (offender “occupies a position of authority in relation to the victim”); Colo. Rev. Stat. 18-3-450.3 (1990 & Supp. 1996) (sexual contact offense in which actor is in a “position of trust” with respect to victim); Fla. Stat. Ann. 794.011(8) (West Supp. 1997) (actor in a position of familial or custodial authority); 720 Ill. Comp. Stat. 5/12-13(a)(4) (West 1993) (actor in a position of “trust, authority or supervision” in relation to victim); Iowa Code 709.4(2)(c)(3) (West Supp. 1997) (the person is “in a position of authority over the other participant and uses that authority to coerce the other participant to submit”); La. Rev. Stat. Ann. 14:81.2 (West 1986 & Supp. 1997) (sexual contact offense accomplished by “the use of influence by virtue of a position of control or supervision over the juvenile”); Mich. Comp. Laws Ann. 750.520b(1)(b)(iii) (West 1991) (the actor is in a “position of authority over the victim and used this authority to coerce the victim to submit”); N.H. Rev. Stat. Ann. 532-A:2(I)(k) (1996) (actor is “in a position of authority over the victim and uses this authority to coerce the victim to submit”); N.J. Stat. Ann. 2C:14-2(a)(2)(b) (West 1996) (actor has “supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional, or occupational status”); N.M. Stat. Ann. 30-9-11(D) (Michie Supp. 1996) (actor “is in a position of authority over the child and uses this authority to coerce the child to submit”); S.C. Code Ann. 16-3-655(3) (Law. Co-op. 1985) (actor is “in a position of familial, custodial, or official authority to coerce the victim to submit”); Tenn. Code Ann. 39-13-502 (Supp. 1996) (actor uses coercion, which is defined as “the use of parental, custodial, or official authority over a child” in Tenn. Code Ann. 39-13-501 (Supp. 1996)); Va. Code Ann. 18.2-370.1 (Michie Supp. 1996) (sexual contact offense committed by one who “maintains a custodial or supervisory relationship” over the child); Wyo. Stat. Ann. 6-2-303(a)(vi) (Michie Supp. 1996) (actor “in a position of authority over the victim and uses this position of authority to cause the victim to submit”).

their victims.⁵¹ These offenders “are viewed as perpetrating an additional betrayal beyond that of simply exploiting a young person for purposes of sexual gratification.”⁵²

Steven Schulhofer has proposed a ban of all sexual relationships between a teacher or supervisor and a student, provided that the student is under the age of eighteen.⁵³ Scholars such as Shakeshaft argue that such relationships should be criminalized even where the victim is eighteen years of age.⁵⁴ The coercive nature of the teacher-student relationship does not change once the student turns eighteen.

There exists a representative sampling of case law addressing whether teachers stand *in loco parentis* to their students, or in other words, whether teachers “are charged factitiously, with a parent’s rights, duties and responsibilities.” Gammon v. Edwardsville School Dist., 403 N.E.2d 43 (Ill. App. 1980) (a dispute where a school official, aware of the imminent danger to Gammon from another student with a violent history, failed to take reasonable steps to protect Gammon from the eventual assault). At least one court has answered this question in the affirmative. Id. In Gammon the Illinois Court of Appeals noted:

Teachers and other certificated educational employees shall maintain discipline in the schools, including school grounds which are owned or leased by the board and used for school purposes and activities. In all matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians of the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.

Id. at 45, citing Illinois statutory provisions. “In meeting that responsibility, teachers and school officials stand in the same position as do parents and guardians.” Id.

Several other courts have similarly held that teachers and schools stand *in loco parentis* to students, at least to a limited extent. See Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993); Beshears v. U.S.D. No. 305, 930 P.2d 1376 (Kan. 1997); Dunn v. U.S.D. No. 367, 40 P.3d 315 (Kan. App. 2002); New York v. Bowers, 356 N.Y.S.2d 432 (NY App. Ct. 1974).

In State of Florida v. Christie, the Florida Court of Appeals found that a teacher was a “caregiver” for the purposes of the state’s child neglect statute. Florida v. Christie, 939 So.2d 1078, 1079 (Fla. App. 2005). The court added that teachers stand *in loco parentis* to, and are responsible for, the well-being of their students during school hours. Id. at 1079-80. Likewise, the Virginia Court of Appeals stated that a teacher maintains a “custodial or supervisory relationship” over a child under

⁵¹Michelle Oberman, *Symposium on Urban Girls: Legal Issues Facing Adolescents and Teens: Article: Regulating Consensual Sex with Minors Defining A Role for Statutory Rape*, 48 Buffalo L. Rev. 703, at 767-68.

⁵²Id.

⁵³Id., citing to Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1998), at 196.

⁵⁴*Educator Sexual Misconduct*, *supra*, at 49.

the age of eighteen for the purposes of its relevant sex-crime legislation. Krampen v. Commonwealth of Virginia, 510 S.E.2d 276 (Va. App. 1999). The Supreme Court of Wyoming reasoned that the word “authority” as used by its legislature includes teachers and coaches, who are “vested with such power by a grant from society.” Scadden v. State, 732 P.2d 1036 (Wyo. 1987).

The idea that teachers stand *in loco parentis* to students is not a steadfast rule. In Ohio, for instance, the relationship of *in loco parentis* is established only when a person assumes responsibilities incident to parental status. Evans v. Ohio State Univ., 680 N.E.2d 161 (Ohio App. 1996). The Ohio Supreme Court held in State of Ohio v. Noggle that the phrase applies to a person who has “assumed the dominant parental role and is relied upon by the child for support.” Ohio v. Noggle, 615 N.E.2d 1040, 1042 (Ohio 1993). A teacher or a coach is not such a person, the court said. Id.⁵⁵

Noggle aside, existing case and statutory law indicate a prevailing view that teachers have significant amounts of authority over their students – even those who are more advanced in age. That multiple courts have determined teachers stand *in loco parentis* to their students demonstrates the extent of this power. Teachers have disciplinary power over students, control over students’ grades, the ability to regulate classroom behavior, and the authority to make decisions that could greatly impact whether students progress in their educational endeavors. These powers apply regardless of a student’s age. Indeed, teachers do not relinquish such powers once a student turns eighteen. Under such circumstances, a student does not have the ability to provide meaningful “consent” where these power disparities exist. Teacher-student relationships are inherently coercive, and the powers exercised by teachers subordinate eighteen-year-old seniors every bit as much as a fourteen-year-old freshmen.

This “power disparity” creates the potential for danger. How often, for example, will an eighteen-year-old student feel compelled to engage in sexual intercourse for the sake of earning a better grade, or to avoid disciplinary or academic retaliation from the offending teacher? Parents send their children to school with the reasonable expectation that they will be in an environment free from predation. Parents look to their lawmakers to ensure that the schools their children attend are safe and abuse free. Without a definitive legislative response, teachers can “birthday-watch,” saving their advances for students who have reached the “legal” age without fear of prosecution.

With regard to eighteen-year-old students, the existing laws blur the line between consensual sex and teacher-educator sex. This is a problem because teacher-student sex is not the same as sex between consenting individuals who have reached the age of consent.

⁵⁵Noggle involved a teacher who established a sexual relationship with a student who was over the age of consent but not the age of majority. The Supreme Court found that the applicable statute did not specifically refer to teacher-student relationships. “Had the General Assembly sought to forbid sexual conduct between teachers and students, it would have done so specifically.” 615 N.E.2d at 1042. The Ohio General Assembly amended the law the next year (1994) to specifically forbid such a relationship. See Ohio v. Shipley, 2004 Ohio 434 (Ohio App. 2004).

The Origin of Existing Laws Making Student-Teacher Sex Illegal

Policymakers in at least one state have reformed their sex-crime legislation in response to a judicial decision. In Noggle, a teacher and coach was charged with sexual battery as a result of alleged sexual conduct with a student. Prosecution was sought under a statutory provision reading in part that no person shall engage in sexual misconduct with another where “the offender is the other person’s natural or adoptive parent, or a stepparent, or guardian, custodian, or person *in loco parentis*.”⁵⁶ It was not the intent of the legislature to include teachers under this part of the statute, the court said. Noggle, 615 N.E.2d at 1042. A high school teacher’s sexual relationship with his or her student, however wrong it may be in the eyes of society, is not considered a criminal wrong by the State of Ohio. Id. at 1041. Interestingly, the legislature had explained when it enacted the statute in 1974 that it intended to “protect individuals in a variety of situations where another might take unconscionable advantage of that individual.”⁵⁷

Concerned that the perpetrator could not be prosecuted because he failed to fall within any of the existing statutory constructions, the Ohio legislature amended the statute in 1994, just one year after the Noggle decision. The Ohio sexual battery statute now includes a provision criminalizing the sexual conduct of an educator who is not the spouse of the victim where:

The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school.⁵⁸

The implication here is to make all educator-student sex illegal, irrespective of whether the student has reached the age of eighteen.

Ohio is not alone. Seven other states have criminalized the conduct of teachers who engage in sexual relationships with their eighteen-year-old students.⁵⁹ The lack of available legislative history makes it uncertain whether the legislatures in these other states were also responding to judicial decisions.

There are some notable variations with respect to the wording of these statutes. Some states, such as Connecticut, Ohio and Arkansas, have added “school employee” provisions to their existing sexual assault or battery statutes.⁶⁰ Other states, such as North Carolina and Iowa, have created

⁵⁶*Ohio R.C. 2907.03(A)(5) (1993).*

⁵⁷See Shipley v. Ohio, 2004 Ohio 434 *supra*, at ¶ 80, citing 1974 Legislative Committee Comment to *Ohio R.C. 2907.03(A)(7)*.

⁵⁸*Ohio R.C. 2907.03(A)(7).*

⁵⁹*Ark. Code Ann. § 5-14-125; Conn. Gen. Stat. § 53a-71; Iowa Code § 709.15; N.C. Gen. Stat. § 14-27.7; Okl. St. §1111; Tex. Penal Code § 21.12; Rev. Code Wash. § 9A.44.093.*

⁶⁰*Ark. Code Ann. §5-14-125; Conn. Gen. Stat. §53a-71; Ohio Stat. 2907.03(A)(7).*

separate sex crime statutes relating specifically to certain offenders such as parents, relatives, teachers, coaches, and school administrators.⁶¹ In either case, the result is fundamentally the same.

North Carolina is interesting in that it specifies that “*consent is no defense* where the offender is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim ...” *N.C. Gen. Stat.* § 14-27.7 (emphasis added). It is possible, if not likely, that the courts in the other seven states would imply that consent is not a defense in such cases.

Most of these statutes have some age requirements in respect to the offender, requiring that the school employee be at least eighteen years of age or a certain number of years or months older than the victim.⁶² Presumably this is so because a smaller age gap between the teacher and student looks less like an abuse of power and more like a consensual sexual relationship. Implicit in all of these statutes is that the offender must work at the same school where the student is enrolled at the time of the conduct.⁶³

There is some differing language in regard to age. The relevant Arkansas statute, for example, is applicable to students who are less than twenty-one (21) years of age. *Ark. Code Ann.* §5-14-125. The relevant Oklahoma provision is applicable to victims who are at least sixteen (16) and less than twenty (20) years of age. Interestingly, the Oklahoma provisions relating to school employees appear within that state’s rape statute. *21 Okl. St.* §1111.

Despite the varied approaches taken by the state legislatures, the spirit of these laws remains the same. They all represent legislative efforts to target sexual misconduct by educators. More directly, they recognize the coercive nature of the teacher-student relationship and reflect a policy that teacher-student sexual relationships are a criminal abuse of the educator’s power. These legislatures recognize that such cases are not about consensual sex; they are about power.

Related Legislative Efforts

A host of states have strengthened their sex crime legislation in response to judicial opinions, without going so far as to make their statutes applicable to eighteen-year-old students. In *State of Alaska v. Carlson*, a high school teacher in Alaska had been charged with two counts of sexual abuse of a minor in the first degree and one count of sexual abuse of a minor in the second degree after he had sex with a seventeen-year-old student. The statutes in effect at the time of litigation prohibited adults from having sex with sixteen and seventeen-year-old minors “entrusted to their care by authority of law.”⁶⁴ The court held that this language did not apply to teachers. *Alaska v.*

⁶¹*Iowa Code* § 709.15; *N.C. Gen. Stat.* § 14-27.7.

⁶²*N.C. Gen. Stat.* § 14-27.7; *Rev. Code Wash.* § 9A.44.093.

⁶³*Ark. Code Ann.* §5-14-125; *Conn. Gen. Stat.* §53a-71; *Iowa Code* § 709.15; *N.C. Gen. Stat.* § 14-27.7; *Ohio Stat.* 2907.03; *21 Okl. St.* §1111; *Tex. Penal Code* § 21.12; *Rev. Code Wash.* § 9A.44.093.

⁶⁴*Alaska Stat.* 11.41.470.

Carlson, No. 3AN-S89-7443 CR at 4 (Alaska Super., January 18, 1990).⁶⁵ Dissatisfied with the result, the Alaska state legislature amended its sex abuse statutes. Wurthmann v. State of Alaska, 27 P.3d 762, 764 (Alaska App. 2001). The state now prohibits sexual conduct with sixteen- and seventeen-year-old children by adults in “positions of authority,” which includes teachers, coaches, administrators, counselors, and other school employees. Wurthmann, 27 P.3d at 764-65.

Indiana, Alaska, and other states have made educator sexual misconduct illegal in respect to victims who are sixteen and seventeen years old.⁶⁶ These legislatures specifically draw the line at eighteen (18) years of age, presumably because that is the age of majority in those states.

Eighteen-year-olds in Indiana can vote, enlist in the armed forces, purchase adult materials, and obtain marriage licenses. Thus, it is understandable for the legislature to give the age special significance. How can an eighteen-year-old person legally get married, but be precluded from entering into a consensual sexual relationship with a person of his or her choosing? Does the fact that the relationship is one of teacher and student change the issue? Professor Estrich says yes:

Teachers have power over students, which undercuts the notion that consent can be given freely; we control their lives, which means it’s not fair to the individual student, or to the other students in the class; it’s an abuse of the teacher’s power, and compromises both the real and perceived fairness of that student’s grades and of any overall curve in the class.⁶⁷

True love, said Estrich, “can wait until the end of the term.”⁶⁸

Estrich hits on many of the points discussed earlier. One point which seems worth repeating is this: With regard to educator sexual misconduct, the legislature needs to focus less on age and more on the nature of the student-teacher relationship. The legislature needs to send an unequivocal message that every student is off limits to school employees. Unfortunately, Indiana and the majority of other states have, as Texas Rep. Warren Chisum says, “virtually made it open season on students [who] are 18-years old.”⁶⁹

Case Law on Teacher-Student Sex

Some civil case law exists with respect to teacher-student sex. These cases further examine the nature of the student-teacher relationship and question whether student-teacher sexual relationships are ever truly “consensual.”

⁶⁵Carlson is cited in Wurthmann v. State of Alaska, 27 P.3d 762, 764 (Alaska App. 2001).

⁶⁶See *Ind. Code Ann.* §35-42-4-7.

⁶⁷See Estrich, *supra* (*Is Teacher-Student Sex OK if the Student is 18?*).

⁶⁸Id.

⁶⁹Id.

At least one court has expressed doubt that eighteen-year-old students can provide meaningful consent. The Plaintiff in Doe v. Warren Consolidated Schools filed a lawsuit alleging that her band teacher sexually harassed and discriminated against her in contravention of Title IX and the Fourteenth Amendment.⁷⁰ Doe v. Warren Consolidated Schools, et al., 2007 U.S. Dist. Lexis 25532 (E. D. Mich. 2007). The evidence in that case demonstrated that the plaintiff was a consenting eighteen-year-old adult who made a conscious decision to engage in a sexual relationship with another adult. It was also determined that the plaintiff had denied to both police and to the defendant's forensic psychologist that the defendant ever threatened her. The court denied the band director's motion for summary judgment. Id. at *12-13. It reasoned that the plaintiff's testimony indicated that the defendant had threatened to tell her parents or give her a failing grade if she ever ended the relationship. There also was evidence that he would embarrass her in class if she made him upset, and that he "had used his authority as a teacher to get with me more emotionally, and control me." Id. at *13. The court went on to cite the nature of the teacher-student relationship as a factor negating the argument that the relationship was ever consensual. Id.

The Court finds that given the teacher/pupil relationship, the school setting in which this first took place, and Plaintiff's allegations that Moore threatened retaliation if Plaintiff disclosed the relationship, there is a question of fact whether the relationship was in fact consensual, and thus, whether Defendant deprived Plaintiff of her right to bodily integrity.

Id.

Other civil cases have examined the power disparity between teachers and students. Although these cases were not decided in respect to students who have reached the age of eighteen, they support the perception that the teacher-student relationship is inherently coercive. The court in Doe v. Independent School Dist. 15 F.3d 443 (5th Cir. 1994) assessed this power differential. In that case, a teacher and coach had entered into a sexual relationship with a minor student. In discussing the differences between casual sex and an abuse of power, Professor Drobac commented on the case, noting the conflicting viewpoints of the concurrence and dissent. She cited Justice Higginbotham, who summarized the conflict in his concurrence:

The majority and dissents divide today over the "law," but that division rests largely on perceptions of the human condition. We have all looked at the same set of facts and come away with quite different perceptions of what transpired between teacher and pupil. The majority sees an exploitation of power and the dissents see casual sex. Make no mistake about it. This case is not about a high school coach who happened to have an affair with a student. It is about an abuse of power.

Id. The Doe dissent, in contrast, demonstrated concern about the child's consent, calling in part for a bright-line rule that would allow recovery under §1983 only where the consenting child was not "sufficiently mature." Id.

⁷⁰The Title IX claim was dismissed. The actual issue addressed was whether a state actor's coercion amounted to a violation of her constitutional right to personal security and bodily integrity. Doe sought to advance her constitutional claim through 42 U.S.C. § 1983. Doe, 2007 U.S. Dist. LEXIS 25532 at *10.

Admittedly, the Doe case did not address the issue of power disparity as it relates to “eighteen-year-old” students. However, it is relevant inasmuch as it illustrates the basic policy question at issue here. Are educator sexual misconduct cases about consent, or are they about power?

In a Title IX case involving a teacher who had sex with a thirteen-year-old student, the Seventh Circuit discussed why sexual harassment at school deserves a different analysis than sexual harassment occurring at work. Mary M. v. North Lawrence Comm. School Corp., 131 F.3d 1220 (7th Cir. 1997). The court pointed out that teachers and school officials have a greater ability to control behavior, and that students look to their teachers for guidance. Id. at 1226-27. To that end, the damage caused by sexual harassment, said the court, is greater in the classroom because the harassment has a more lasting impact on younger victims. Id. Finally, the court pointed out that it is nearly impossible for children to leave their assigned school, adding that a sexually abusive environment prevents students from getting the most out of their education. Id.

The Mary M. court’s discussion regarding the uniqueness of an academic setting makes this case pertinent to the discussion. It is error to say that a teacher has less classroom control over an eighteen-year-old student. Likewise, an eighteen-year-old student may look to his or her teacher for guidance and wisdom in very much the same way as a younger student. Although an “adult” student has the option to leave school, to do so would be at the student’s peril.

While the Doe and Mary M. cases dealt with younger victims, that is not to say the power differential would be inapplicable to cases involving seemingly consenting eighteen-year-old students. The Supreme Court of Idaho, for example, has refused to recognize a duty of care owed by teachers to consenting students who have reached the age of majority. Hei v. Holzer, 73 P.3d 94 (Ida. 2003).

The Supreme Court of Iowa held similarly in Stotts v. Eveleth 688 N.W.2d 803 (Iowa 2004). That court found that there was no breach of fiduciary duty where a teacher engaged in sexual activities with an eighteen-year-old student, and where the relationship was one between “consenting adults.” Interestingly, in reaching its conclusion, the Stotts court did consider as separate factors that the plaintiff was not one of the defendant’s students and that there was no evidence of “coercion or an abuse of power.” Id. at 810-11. It also considered as grounds for its decision that no evidence existed indicating that the plaintiff “reposed faith, confidence and trust” in the defendant. Id. It is possible the court’s decision would have been different had the defendant been the plaintiff’s teacher.

In sum, the relevant civil law provides no clear direction. At least one court has implied that an eighteen-year-old student may not be able to provide meaningful consent to sexual relations with a teacher, coach, or administrator. Other cases, such as Stotts, seem to imply the opposite. No case was found directly holding that eighteen-year-old students can or cannot consent to sex with a school employee. At any rate, there are numerous civil cases discussing the uniqueness of the student-teacher relationship, pointing out that teachers have a significant amount of control over their students. The willingness of courts to recognize this power disparity seems meaningful to the present discussion.

Challenges to Existing Blanket Laws

The eight statutes criminalizing the actions of educators who have sexual relationships with eighteen-year-old students have triggered numerous legal challenges.

Lawrence v. Texas. Underlying many of the legal challenges to blanket legislation in this area is concern about the rights of adults to engage in noncommercial, consensual sexual activity with whomever they choose. The landmark case of Lawrence v. Texas discussed these rights in detail. Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003). In that case, the United States Supreme Court invalidated a Texas statute making it a criminal offense for individuals of the same sex to engage in “certain intimate conduct.” *Id.* The Court reasoned that the statute violated the right to substantive due process, while noting “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Id.* at 571-72. The court frowned upon state interference in private relationships, but did not establish a “fundamental right” to consensual sex. As such, the court applied a rational basis review to the Respondent’s equal protection and due process claims. *Id.* at 578-79. The court went on to say, however, that the statute furthered no legitimate state interest that could justify intruding into the private lives of consenting adults conducting themselves in an otherwise legal manner. *Id.*

The Lawrence court did not extend its decision to minors, or to those “who might be injured or coerced or who are situated in relationships where consent might not be easily refused.” *Id.* at 578.

Constitutional Challenges to Existing Statutes

Basically all legal challenges to blanket legislation have been on constitutional grounds.

The Van Clifton Case

The most recent case of record was decided by the Supreme Court of Connecticut. Connecticut v. Van Clifton McKenzie-Adams, 915 A.2d 822 (Conn. 2007), *cert. den.*, 128 S. Ct. 248 (2007). In Van Clifton, a defendant teacher engaged in a sexual relationship with two sixteen-year-old students. The teacher was convicted of sexual assault under a statute prohibiting sexual intercourse with another person when the actor is “a school employee and such other person is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor....” *Conn. Gen. Stat.* §53a-71. The defendant claimed that the statute violated his fundamental right to privacy guaranteed by the federal and state constitutions. These rights, he argued, include the fundamental right to engage in consensual sexual intercourse with individuals over the age of consent.

The Van Clifton court did not decide whether Lawrence established a fundamental right of sexual privacy under the federal constitution. Even assuming *arguendo* that it did so, that right would not extend to a teacher engaging in a sexual relationship with a student. *Id.* at 836. The court discussed the uniqueness of the teacher-student relationship.

In light of the disparity of power inherent in the teacher-student relationship, we conclude that both victims were situated in an inherently coercive relationship with the defendant wherein consent might not easily be refused.

Id. Implicit in this rationale is that the coercive nature of the teacher-student relationship would allow the Connecticut statute to pass muster under even the highest standard of constitutional scrutiny.

Applying the rational basis test, the court next determined whether the Connecticut statute was reasonably related to a legitimate government interest. The court held that the statute was related to the legitimate state aim of promoting a safe school environment. Id. at 837. It reasoned that the statute prohibits a teacher from abusing his or her authority over students to pursue a sexual relationship with students enrolled in the same school system. Id. Indeed, “it is beyond cavil that the government has a legitimate interest in providing a safe and healthy educational environment for elementary and secondary school students.” Id.

Finally, the court addressed the defendant’s argument that the Connecticut state constitution provided greater protection for the right of privacy than the federal constitution. Id. The court looked at various factors such as the intent of the constitution’s drafters, relevant federal and state precedents, and the text of the operative constitutional provisions. Id. at 838. It found that none of these factors evidenced that the Connecticut state constitution conferred a fundamental right of sexual privacy on teachers to engage in sexual intercourse with students over the age of consent. Id. at 840. In dismissing the defendant’s argument, the court added:

Notably, no state has concluded that a state constitutional right of sexual privacy exists when a significant disparity of power is inherent in the prohibited sexual relationship, such as the disparity of power endemic to the teacher-student relationship.... Indeed, as the defendant concedes, numerous states have enacted penal statutes prohibiting elementary or secondary schoolteachers from having sexual intercourse with their students, regardless of the allegedly consensual nature of the sexual relationship.

Id. at 840-41.

Ex Parte Morales

In Ex Parte Morales, 212 S.W.3d 483 (Tex. App. 2006) a teacher had entered into a sexual relationship with a seventeen-year-old student and was convicted under a Texas statute reading:

An employee of a public or private primary or secondary school commits an offense if the employee engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee’s spouse.

Tex. Penal Code 21.12. The defendant asserted that the federal and state constitutions recognize a fundamental liberty interest in private sexual conduct between consenting adults. He further contended that under a strict scrutiny analysis, infringement upon this right should be permitted only if it is narrowly tailored to a compelling state interest. The defendant contended as such that the Texas statute was unconstitutionally vague and overly broad in proscribing conduct beyond which the state would have a compelling interest. Morales, 212 S.W.3d at 487.

The court noted at the outset that a statute is impermissibly overbroad only where it “reaches a substantial amount of conduct protected under the First Amendment.” Id. at 490. Because the defendant’s claim was one of due process and did not implicate the First Amendment, the court dismissed the defendant’s overbreadth claim. Id. at 492. The court added that the liberty interest recognized by the court in Lawrence did not confer a fundamental right to sexual privacy, nor is such a liberty interest entitled to strict scrutiny analysis. Id. at 492-93. Accordingly, the court applied a rational basis review in deciding the defendant’s due process and equal protection claims. Id.

Under its rational basis review of the Texas statute, the Morales court first determined that the state had a legitimate interest in preventing the sexual exploitation of students. Id. at 496. It pointed out that:

The legislature could also have rationally considered that school employees, whether possessing a teaching certificate or not, are given unique access to students, and are thereby vested with great trust and confidence by the school, parents, and public, and sought to preserve or strengthen that trust by unequivocally prohibiting school employees from misusing their access to students as a conduit for sex.

Id. Second, the legislation was rationally related to the state’s interest in maintaining a “safe and disciplined environment conducive to student learning.” Id. A third state interest is that of preventing classroom disruption. Teacher-student relationships, if widely known by other students and faculty members, would be distracting. Id. at 497. Similarly, students may be unfairly advantaged or disadvantaged based on their willingness to engage in sexual activity with their teachers. Id.

As to the defendant’s vagueness claim, the court cited the well settled principle that a criminal statute “is not vague if it gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited and it provides sufficient notice to law enforcement to prevent arbitrary or discriminatory enforcement.” Id. at 498. The court held that a person of ordinary intelligence would be able to understand whether he or she fell within the statutory definition of “school employee,” and whether he or she is engaged in a sexual relationship with a student enrolled at the same school. Thus, the defendant’s argument was without merit. Id. at 499-500.

Finally, the defendant argued that the statute violated his equal protection guarantee because it targeted sexual conduct between school employees and students, but did not extend to employees and students who are married. The defendant also argued that there was an unfair distinction between school employees and members of the general public. The court observed in part that

such distinctions were not unconstitutional and were rationally related to the state's interests in maintaining a safe and abuse-free school system. *Id.* at 502-503. The marriage distinction is necessary to avoid an unconstitutional infringement upon the marital relationship, the court said. *Id.* Further, a marital relationship would presumably allow the state to rule out coercion. *Id.*

State of Washington v. Clinkenbeard

In *State of Washington v. Clinkenbeard*, 123 P.3d 872 (Wash. App. 2005) the defendant challenged a statute that permitted the prosecution of a school employee who had sexual intercourse with a student who is legally an adult. The statute did not require the school employee to be in a position of authority over the student. Applying a rational basis review, the court held that “because the statute was not wholly irrelevant to the goal of preventing the exploitation of students, and therefore not arbitrary, [the statute] did not violate [the] defendant’s right to substantive due process.” *Id.* at 879. In finding the rational basis test to be satisfied, the court noted that the state has a constitutional obligation to provide an education to its children. Thus, the state has a legitimate interest in providing a safe school environment where school employees will not be permitted to coerce their students into sexual activity. *Id.*

The *Clinkenbeard* court next addressed the defendant’s equal protection argument. It first noted the firmly established principle that to invalidate a statute on equal protection grounds, the challenger must show that no facts exist justifying the classification. To that end, a legislative distinction will survive the rational basis test if (1) all members of the class are treated alike; (2) there is a rational basis for treating differently those within and outside of the class; and (3) the classification is rationally related to the purpose of the legislation. *Id.* at 567. Under this framework, the court observed that school employees are singled out because they have “unique access to children, often in an unsupervised context, and can use that access to groom or coerce children or young adults into exploitive or abusive conduct.” *Id.* This, said the court, is rationally related to the state’s aims of providing a safe school environment. Accordingly, there was no violation of the defendant’s right to equal protection. *Id.*

Ohio v. Vinson Shipley

In the case of *Ohio v. Vinson Shipley*, 2004 Ohio 434, 2004 Ohio App. LEXIS 393 (Ohio App. 2004), the court held that the Ohio statute was neither arbitrary nor a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at ¶¶ 79-81.⁷¹ Shipley argued that the statute impermissibly singled out teachers. The court reasoned that the statute was “rationally related to its purpose of preventing teachers from taking unconscionable advantage of their students by using their undue influence over the student in order to pursue sexual relationships.” *Id.* at ¶ 81.

Other Texas Cases

At least three additional cases have been brought challenging the Texas statute. These cases likewise addressed constitutional challenges relating to equal protection, due process, overbreadth and vagueness. In each of these cases, the defendant’s claims were denied. *Berkovsky v. State*,

⁷¹The teacher was challenging the 1994 amended statute passed by the Ohio General Assembly in reaction to the 1993 decision by the Ohio Supreme Court in *Ohio v. Noggle*, 615 N.E.2d 1040 (Ohio 1993) discussed *supra*.

209 S.W.3d 252 (Tex. App. 2006); In re: Shelly Kasandra Shaw, 204 S.W.3d 9 (Tex. App. 2006); Ex Parte Hernando Guerrero, 2006 Tex.App. Lexis 10780 (Tex. App. 2006).

Other Contexts

Several other courts have declined to extend the Lawrence liberty interest to situations in which there is significant power disparity between the offender and the victim. One court held, for example, that the Lawrence liberty interest does not apply to sexual contact between correctional staff and prison inmates because of the power differential between a prison guard and a prisoner. Commonwealth of Pennsylvania v. Mayfield, 574 Pa. 460, 472 (Pa. 2003). Neither does a clergyman have a fundamental right under Lawrence to use his position of trust and authority to encourage sexual activity. Talbert v. State of Arkansas, 2006 Ark. Lexis 446 (Ark. 2006). Furthermore, a sexual relationship between superior military personnel and their organizational inferiors may be such that “consent might not easily be refused.” Loomis v. United States, 68 Fed. Cl. 503, 519 (Fed. Cl. 2005). Intrinsic in all of these findings is judicial skepticism about sexual relationships arising out of situations where power disparities exist.

VI. A Proposal for Statutory Intervention

The significance of the case law is twofold. First, it emphasizes the concern that courts have about preventing the abuse of power. Second, legislation similar to that found in Ohio and Texas will not easily be overturned, at least not on constitutional grounds. In Indiana – and in the majority of other states – every enacted statute is “clothed with the presumption of constitutionality, and such presumption continues until clearly overcome by a showing to the contrary.” Sidle v. Majors, 341 N.E.2d 763, 766 (Ind. 1976). Given this presumption, it seems unlikely that further constitutional challenges in these states would be successful.

As noted, widespread recognition of the power differential between teachers and students has led researchers and scholars such as Shakeshaft to call for the other forty-two (42) states to implement similar blanket legislation.⁷²

Notable Opposition

Indiana and other states have recognized this potential for abuse of power, though only to a degree. These states have not imposed an explicit ban on all educator-student sex. Opponents of such laws argue that they are unfair to students who are otherwise allowed to consent to a sexual relationship. Such paternalism would cut to the heart of important individual freedoms and the ability of two consenting persons to engage in private, consensual sex. Supporting their argument is the belief by most people that adulthood begins at the age of eighteen. Eighteen-year-old students who have been sexually harassed by their teachers may be entitled to civil remedies if criminal prosecution is not available.

⁷²*Report on Educator Sexual Misconduct, supra*, at 51.

Critics of Texas' legislation have argued that the law is too harsh.⁷³ They argue that the law should have different provisions for different ages and should consider whether or not the student "consented."⁷⁴ Even the original drafter of the Texas law has complained that it is too harsh. Indeed, she "intended her measure to include only students seventeen and younger because she wanted to protect high school students not old enough to vote or serve in the military, but the bill was amended by other lawmakers who believed any sexual contact with a student was an abuse of power by an educator."⁷⁵ Other Texas lawmakers have justified the bill because it sends a clear message that all students are off limits to school employees, and that it recognized the power disparity between teachers and students.⁷⁶

Other problems with the Texas law include a lack of uniformity in enforcement. In the first arrest made under the revised Texas statute, a grand jury declined to prosecute a twenty-five-year-old female teacher and former beauty contest participant who had a sexual relationship with an eighteen-year-old male student.⁷⁷ Less than a year later, however, a thirty-five year-old male teacher and coach who had a sexual relationship with a seventeen-year-old female student was prosecuted under the Texas law and faced up to twenty years in prison.⁷⁸ As noted above, Estrich sees this as a double standard relating to gender.⁷⁹ Others might argue that the problem relates to age differential, a seventeen-year-old student being more in need of protection than an eighteen-year-old "adult" student.

This lack of uniformity points to the overarching debate. At the least, it indicates that opponents of blanket laws see the issue as related to age and "consent." Proponents of the laws frame the issue as one of "power" and coercion inherent in an educator-student relationship.

The Fundamental Issue

The ultimate question is one of policy. Specifically, is it good policy to criminalize educator sex with all students, irrespective of the student's age? Should educator sexual misconduct cases be evaluated based on age and whether the student has "consented," or should they be evaluated in light of the power disparity between teachers and their students? Is it fair to infringe upon the

⁷³**World Net Daily**, *Grand jury declines to indict female teacher. Former Miss Texas contestant charged for sexual relations with student*, 18 (April 29, 2007). Available at http://wnd.com/news/article.asp?ARTICLE_ID=52101

⁷⁴Brandon Formby, *Cleburne Coach Accused of Having Sex with Student*, **The Dallas Morning News** (January 25, 2007). Available at www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/012407dnmetcoach.15

⁷⁵See **World Net Daily Article**, *supra*.

⁷⁶See Formby Article, *supra*.

⁷⁷Brandon Formby, *Ex-Teacher Avoids Trial in Sex Case*, **The Dallas Morning News** (September 21, 2006). Available at www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/092206dnmethebronfo

⁷⁸*Id.*

⁷⁹See Estrich, *supra*.

right of an eighteen-year-old to engage in a consensual sexual relationship with a person of his or her choosing? Conversely, can an eighteen-year-old student really “consent” to a relationship with someone who has the authority to fail the student or otherwise impede the student’s education? Is there not something that makes a teacher-student relationship different from other sexual relationships between consenting adults?⁸⁰

Proposed Legislation

If the perception is that the core issue is one of “power disparity” and not one of age, Indiana may either revise its child seduction statute or create a separate statute relating specifically to school employees. Potential language amending Indiana’s child seduction statute could read as follows:

If a person who is at least (18) years of age; and:

1. Is a school employee or volunteer, including a teacher, administrator, coach, or other person in authority employed by or serving in a public school corporation, public school, or nonpublic school; or
2. Is an independent contractor or employee of an independent contractor providing services to a public school corporation, public school, or nonpublic school;
3. Engages with any student enrolled in or attending the same school in sexual intercourse, deviate sexual conduct (as defined in IC 35-41-1-9), or any fondling or touching with the intent to arouse or satisfy the sexual desires of either the employee or the student; and
4. Is not enrolled in and does not attend that school;

the person is guilty of child seduction, a Class D felony.

This proposed language is a hybrid of the state’s current child seduction statute and Ohio’s sexual battery legislation passed in response to the Ohio Supreme Court’s decision in Noggle, supra.⁸¹ If the Indiana legislature were to amend its child seduction statute, it would have to determine how best to incorporate the new language with the existing language pertaining to shelter care employees and adoptive parents. It may be advisable to include a provision requiring the school employee to be so many years older than the student in order to prevent criminalizing a situation where a nineteen-year-old janitor employed by an independent contractor has a relationship with an eighteen-year-old senior. Some might argue, however, that such a provision would shift the focus back to age, while ignoring the power differential between school employees and students. A nineteen-year-old substitute teacher likely would be viewed differently from a janitor of the same age.⁸²

⁸⁰It should be noted that states have recognized that certain relationships cannot be considered consensual, irrespective of the age of the participants, due to the inherently coercive aspects of the relationship, such as within a prison, hospital, or treatment context.

⁸¹See *Ind. Code* §35-42-4-7; *Ohio Rev. Code Ann.* 2907.03(7) .

⁸²Representative Kreg Battles (D-Vincennes) has introduced House Bill No. 1032 in the 2008 session of the Indiana General Assembly. HB 1032 proposes to amend I.C. 35-42-4-7 (child seduction statute) to include not only school employees, but others who “work for compensation” or volunteer at a public or nonpublic school. The legislation appears to be in response to Rick L. Smith v. Indiana, 867 N.E.2d 1286 (Ind. 2007), a case involving charges against a school bus driver who allegedly fondled a seventeen-year-old student. The bus driver was charged

Another option would be to construct legislation similar to the Texas statute, *Tex. Penal Code* § 21.12, which specifically and individually focuses on school employees. It reads as follows:

- a. An employee of a public or private primary or secondary school commits an offense if the employee engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee's spouse.
- b. An offense under this section is a felony of the second degree.
- c. If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or both sections.

The Indiana legislature has not directly addressed this issue. Presently, teachers, coaches, and other licensed school employees could coerce eighteen-year-old students into a sexual relationship without fear of prosecution. Although it could be (and has been) argued that these students are really “consenting” adults, is such “consent” meaningful, given the significant amount of control that teachers have over their students’ educational progress?

Whether blanket legislation is the answer, the Indiana legislature must carefully consider existing systematic loopholes that may allow predatory educators to exploit students. The legislature should consider the uniqueness of the teacher-student relationship: Is an eighteen-year-old student as vulnerable and deserving of protection as one who is seventeen or younger?

STUDENT PREGNANCY AND THE FOURTH AMENDMENT

While the Fourth Amendment protects individuals from unreasonable searches and seizures by the government,⁸³ and this constitutional provision applies to the public schools, public school officials need not have probable cause before conducting a search of a student. A reasonable suspicion the student has or is violating either a law or rule of the school is sufficient. New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985). In T.L.O., the U.S. Supreme Court found that a school official’s search of a high school student’s purse after she had been discovered smoking cigarettes in the school lavatory was justified at its inception and reasonable in its scope, even though the search for cigarettes revealed the student possessed drugs and drug paraphernalia.

The accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools

with “child seduction,” but he was not “employed” by the school corporation. He was employed by an independent contractor and thus did not come under the definition of a “child care worker” for application of the “child seduction” statute. This charge against Smith had to be dismissed. Chief Justice Randall T. Shepard, in his concurring opinion, noted the court’s dilemma: “Distasteful as it may be given the facts of the present case, I think the Court does the right thing to use the regular, garden-variety definition of ‘employed,’ with the understanding that the General Assembly has the power to broaden the class of persons covered by the statute should it choose to do so.” 867 N.E.2d at 1289.

⁸³“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

469 U.S. at 341. The Court developed a two-prong test for determining the reasonableness of a search: (1) whether the action was justified at its inception; and (2) whether the search “was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* The first prong is satisfied where “there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* The second prong is satisfied where “the measures adopted are reasonably related to the objectives of the search and [are] not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* at 342.

The Supreme Court extended its holding in T.L.O. in two later decisions addressing the use of random, suspicionless drug-testing of students. In 1995, the Court decided Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386 (1995), upholding a school district’s random drug-testing of students engaged in extracurricular activities. The Court found that student athletes have a lesser expectation of privacy given their voluntary commitment to participate in athletics where a variety of intrusions on one’s privacy can be expected, from “communal undress” to multiple rules and regulations of conduct and dress. Any intrusion of a student-athlete’s privacy as a result of a urine sample would be “negligible” since the method of securing the sample is little different from the experience one would have in a public restroom and the results are not shared with law enforcement. In addition, the school district had a compelling interest in deterring drug use, especially among student-athletes where the risk of physical harm is greater. The school district also demonstrated its concern regarding drug use was of an immediate one since drug use and abuse had reached “epidemic proportions” among athletes. The random, drug-testing program effectively addressed this concern and was likely to deter future drug use and abuse. The policy was both reasonable and, hence, constitutional. 115 S. Ct. at 2396. The Court did caution that such random, suspicionless drug-testing might not “pass constitutional muster in other contexts.” *Id.*

In 2002, the Supreme Court revisited the issue. In Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 122 S. Ct. 2559 (2002), the school district’s policy on random drug-testing of students extended to any competitive extracurricular endeavor. This included not only athletics but the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, and cheerleading. Earl challenged the policy, noting that—unlike in Vernonia, *supra*—there was no demonstrable drug problem in the school district. The Supreme Court acknowledged that “searches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests.” 122 S. Ct. at 2564. In a school context, probable cause and a warrant are not required, as previously noted in T.L.O., because such requirements would interfere with the “swift and informal disciplinary procedures” needed in the schools. *Id.* at 2565. The government, including the public schools, can conduct searches without individualized suspicion where “special needs” can be demonstrated, and that the Supreme Court found in Vernonia that deterrence of drug use and abuse satisfies the “special needs” requirement, justifying the use of random, suspicionless drug-testing of student athletes. The Court added,

however, that Vernonia “did not simply authorize all school drug testing, but rather conducted a fact-specific balancing of the intrusion of children’s Fourth Amendment rights against the promotion of legitimate governmental interests.” Id.

In Earls, the school’s drug-testing policy extended to non-athletic extracurricular activities. The Court did not find this distinction relevant. Public schools are “responsible for maintaining discipline, health and safety.” Even though students in non-athletic extracurricular activities may have a higher expectation of privacy than athletes, Vernonia was not intended to limit the legitimate governmental interest a public school has in deterring drug use and abuse. There are sufficient similarities between those engaged in athletic and non-athletic extracurricular endeavors: both have voluntarily subjected themselves to many of the same intrusions on privacy, especially on trips, and both have requirements “that do not apply to the student body as a whole.” Id. at 2566. The students are subject to supervision and regulation applicable to all extracurricular activities, and, as a consequence, “have a limited expectation of privacy.” Id.

The school’s policy and procedure did ensure the confidentiality of the results. The samples were also collected in such a fashion as to be “negligible” intrusions. Id. Test results are not provided to law enforcement and school personnel would have access only on a “need to know” basis. Test results do not serve as a basis for discipline and do not affect academic standing. Id. at 2566-67. The only consequence would be to limit a student’s participation in extracurricular activities. Id. at 2567. “Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students’ privacy is not significant.” Id.

Lastly, although the “drug problem” in this school district may not have been as pervasive as in Vernonia, a demonstrated drug-abuse problem is not always needed to support institution of a random drug-testing program. Id. at 2567-68. “[T]his Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing.” Id. at 2568. “[W]e find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.” Id. at 2569.

Student Pregnancy and the Fourth Amendment

T.L.O. advised that although school officials need not have probable cause but only a reasonable suspicion that a law or school rule is being broken, any eventual search must be reasonable in its scope and “the measures adopted are reasonably related to the objectives of the search and [are] not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” 469 U.S. at 342. Vernonia and Earls extended the application of T.L.O. to searches where there are “special needs” the public school is attempting to address (in both cases, drug use). Health and safety concerns figured prominently into this mix. The question is how far an application of Vernonia and Earls can be made? Can a student who may be pregnant be required to undergo a test for this purpose? What confidentiality requirements apply to the results of such tests? The

Supreme Court has not yet been presented with this issue, but lower courts have had occasion to address such concerns.⁸⁴

Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000) involved a swim coach who suspected one of his athletes was pregnant. Despite her repeated denials, the swim coach allegedly required her to take a pregnancy test. The athlete and her mother sued the swim coach, claiming the pregnancy test and resulting actions constituted an illegal search in violation of the athlete's Fourth Amendment rights. Additional claims also involved invasions of privacy, both personal and familial, as well as certain First Amendment rights (free speech and association).

Gruenke was 17 years old and in the eleventh grade. The swim coach noticed that Gruenke was often nauseous, made frequent trips to the bathroom, and complained about having a low energy level. He noticed that her body shape was "changing rapidly." The assistant swim coach also observed this. Both the assistant swim coach and the swim coach asked if she were pregnant. She denied that she was. Other members of the swim team (and their mothers) also suspected Gruenke was pregnant. The swim coach asked the guidance counselor and the school nurse to inquire, but Gruenke again denied she was pregnant and refused to volunteer any information. One of the mothers purchased a pregnancy test and gave it to the swim coach, who reimbursed her for the expense. 225 F.3d at 295-96.

Two swim team members approached Gruenke and suggested she take the pregnancy test to "clear her name." She refused, insisting she would only take the test if everyone on the swim team did so. The team members again approached Gruenke, indicating the swim coach wanted her to use the pregnancy test. The swim coach denies he asked team members to encourage Gruenke to take the test, but he acknowledged that "if [Gruenke] were his friend, he would ask her to take a pregnancy test." Id. at 296.

After this latter attempt to have her take the pregnancy test, Gruenke wrote to the swim coach stating that he had "no right to make her take a pregnancy test." The two swim team members approached Gruenke a third time, representing that if she did not take the test, the swim coach would take her off the relay team. Gruenke consented to take the test, which turned out positive. Gruenke and the team members purchased two more pregnancy tests, both of which resulted in negative indications. When Gruenke told her mother of the events, the mother became upset. A team member talked to Gruenke that evening, indicating a fourth pregnancy test had been purchased. Gruenke took this test the next morning. The results were again negative. Id. at 296-97.

The swim coach learned of the positive test result and asked a physician if, in his medical opinion, "it was acceptable for a pregnant swimmer to compete on the team." The physician said that swimming would not endanger the student's pregnancy. The swim coach decided not to remove Gruenke from the swim team. However, he never sought to discuss his concerns with Gruenke's parents or to inform school administration of his concerns. Gruenke's mother took her to see a physician where it was determined that she was almost six months pregnant. Id. at 297.

⁸⁴The Supreme Court did state in passing that it found the drug-testing program reasonable (and, hence, constitutional) in significant part because "the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." Vernonia, 515 U.S. at 658, 115 S. Ct. at 2393.

The federal district court granted summary judgment to the swim coach, finding that he did not violate any clearly established constitutional right or, in the alternative, if he did, such a constitutional right was not clearly established at the time. *Id.* at 297-98. The U.S. Third Circuit Court of Appeals agreed that the swim coach was entitled to qualified immunity as to the “familial privacy” and First Amendment claims, but reversed the district court with regard to the Fourth Amendment.

The 3rd Circuit agreed that “a school official’s administration of a pregnancy test to a student clearly constitutes a search within the meaning of the Fourth Amendment.” *Id.* at 300 (citation and internal punctuation omitted). The district court erred by finding that Gruenke’s right to be free from this type of search was not clearly established because the question was one of first impression. *Id.*

Merely because the Supreme Court has not yet ruled on whether a school official’s administration of a pregnancy test to a student violates her Fourth Amendment rights does not mean the right is not clearly established. Moreover, a review of current Fourth Amendment law in the public school context reveals not only that the right is clearly established, but also that [the swim coach’s] conduct as alleged was objectively unreasonable.

Id. Relying upon *T.L.O.* at *Vernonia* (*Earls* had not yet been decided), the 3rd Circuit noted that “reasonableness is determined by balancing the government’s interest against the individual’s expectation of privacy. In the public school context, students have a reduced expectation of privacy when compared with the public at large.” The government’s interest must be a compelling one. *Id.* at 301.

We believe that the standard set forth in *Vernonia* clearly establishes that a school official’s alleged administration to a student athlete of the pregnancy tests would constitute an unreasonable search under the Fourth Amendment. Although student athletes have a very limited expectation of privacy, a school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy and the exercise of some discretion. This is not to say that a student, athlete or not, cannot be required to take a pregnancy test. There may be unusual instances where a school nurse or another appropriate school official has legitimate concerns about the health of the student or her unborn child. An official cannot, however, require a student to submit to this intrusion merely to satisfy his curiosity.

Id. The swim coach is not entitled to qualified immunity, the Court wrote, because his conduct violated a clearly established right that a reasonable person would have known. *Id.* “[A] reasonable swim coach would recognize that his student swimmer’s condition was not suitable for public speculation. He would have exercised some discretion in how he handled the problem. [The swim coach], however, has offered no explanation that could justify his failure to respect the boundaries of reasonableness.” *Id.* at 302.

“Unusual Circumstances”

The Gruenke court, while finding a public school cannot compel a student-athlete to take a pregnancy test absent a legitimate health concern, did opine that “[t]here may be unusual circumstances where a school nurse...has legitimate concerns about the health of the student or her unborn child.” Gruenke, 225 F.3d at 301.

The role of a school nurse was implicated in Villanueva v. San Marcos Consolidated Independent School District, et al., 2006 U.S. Dist. LEXIS 68280 (W.D. Tex. 2006). In Villanueva, a male student told the school nurse that M.V., a 15-year-old student, believed she was pregnant. The male student thought he might be the father. The school nurse confronted M.V., who initially denied either being pregnant or having a sexual relationship with the male student. The school nurse suggested M.V. take a pregnancy test, which she did. The results were negative. The school nurse then recommended M.V. start taking birth control pills. Id. at *2-4. The school nurse did not inform M.V.’s parents of the pregnancy test, later stating that she did not believe she was under any obligation to do so. Id. at *5. The principal was unaware that pregnancy tests were available at the school or that the school nurse was administering them. The school board was likewise unaware of the availability of the pregnancy tests or of any policy regarding them. Id., n. 3.

The assistant superintendent was aware of the purchases of the pregnancy tests. They were purchased by the director of the school’s Parenting Education Program (PEP), which is designed to help pregnant students with their pregnancies and help at-risk students avoid becoming drop-outs. The pregnancy testing program was discontinued after M.V.’s father complained. Id. at *6-7.

M.V. sued the school district and the school nurse, claiming primarily a violation of her Fourth Amendment rights by insisting she take a pregnancy test against her wishes. She also claimed state tort law claims of assault and battery and invasion of privacy. Id. at *7. Both the school district and the school nurse moved for summary judgment.

The court granted the school district’s motion. M.V. did not “contend that the pregnancy testing program took the form of official policy” of the school district. In fact, the school board—the entity authorized by law to govern and oversee the management of the school district—was unaware of the purchase, dispensing, and administration of the pregnancy tests. “Given this, it is beyond dispute that [the school district] did not have an official policy that led to the alleged constitutional violations at issue here.” Id. at *8-11. Even assuming the school board had constructive knowledge of the program, the school district is entitled to summary judgment. The program making available pregnancy tests to students on a voluntary basis does not violate the Constitution. There was no evidence that students were coerced or convinced to take the tests. “The record is entirely devoid of evidence showing that any girl in [the school district] was given a pregnancy test in a coercive environment (other than the allegations made by M.V.).” Id. at *14-16. “[T]he Plaintiffs have failed to provide the Court with any evidence of a direct causal link between the practice identified here—a voluntary pregnancy-testing program—and the constitutional deprivation alleged.” Id. at *16.

M.V. also sued the school nurse in the school nurse’s individual capacity. The school nurse moved for summary judgment, claiming that she has qualified immunity. The court noted that “[q]ualified

immunity shields government officials performing discretionary functions from individual liability for civil damages insofar as their conduct does not violate clearly established rights of which a reasonable person would have known.” *Id.* at *18 (citations, internal punctuation omitted). To evaluate a claim of qualified immunity, a court must determine whether a plaintiff has actually alleged a constitutional right at all. If so, then a court will need to determine whether such a constitutional right was “clearly established” at the time of the purported violation. *Id.* at *19.

The Supreme Court has stated that in determining whether a right is “clearly established,” the “contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent.” *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed.2d 523 (2002) (citation omitted). Qualified immunity should not be denied unless the law is clear in the more particularized sense that reasonable officials should be “on notice that their conduct is unlawful.” *Saucier v. Katz*, 533 U.S. 194, 206, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001).

Id. Assuming the school nurse did coerce M.V. to take the pregnancy test, as alleged, the court must first determine whether such an action would violate M.V.’s Fourth Amendment rights. Relying upon *T.L.O.*, the court noted that the Fourth Amendment protects individuals from unreasonable searches and seizures, but within a public school context, reasonableness is determined by balancing the public school district’s compelling interest against the student’s expectation of privacy. As the Supreme Court found in *Vernonia*, public school students have a reduced expectation of privacy when compared with the public generally. The “nature of the intrusion” must also be considered when assessing the reasonableness of a school search. *Id.* at *21-22.

The court relied upon *Gruenke* to find that administration of a pregnancy test to a student in a coercive atmosphere would constitute an unreasonable search under the Fourth Amendment. *Id.* at *22-23. Having concluded M.V. has alleged a violation of a constitutional right, the court then turned to whether the school nurse’s conduct violated a “clearly established” constitutional right. The court found that “the coerced administration of a pregnancy test violates clearly established constitutional rights.” *Id.* at *23-24. Even accepting this conclusion, however, the court still had to decide whether the school nurse’s actions were “objectively reasonable under the law at the time of the incident.” *Id.* at *24-25. This was more problematical for the court because M.V.’s version and the school nurse’s version of the incident vary widely. *Id.* at *25. “This contradictory testimony precludes summary judgment for [the school nurse] insofar as the claims against her in her individual capacity are concerned because a material fact issue exists as to M.V.’s voluntariness in taking the pregnancy test.” *Id.* at *25-26.

If consent [were] given, then [the school nurse’s] actions would clearly be objectively reasonable. On the other hand, if [the school nurse] did in fact coerce Plaintiff into agreeing to be tested, then, in light of the clearly established law

prohibited such searches of students, [the school nurse's] actions would not be objectively reasonable.

Id. at *26. The court denied summary judgment to the school nurse. The dispute in testimony would have to be resolved at trial.⁸⁵

M.V. appealed to the U.S. Fifth Circuit Court of Appeals. The 5th Circuit, in a *per curiam* and unpublished opinion, found the plaintiffs had not provided competent proof that the school nurse's actions were objectively unreasonable in light of clearly established law at the time of the incident. Villaneuva v. San Marcos Consolidated Independent School District, et al., 2007 U.S. App. LEXIS 17208 (5th Cir. 2007).

Contrary to [the father's] allegation that [the school nurse] harangued his unwilling daughter into submitting a urine sample, the record contains no evidence of coercion on [the school nurse's] part or any indication that [M.V.] did not voluntarily consent to testing. Even assuming *arguendo* that [the school nurse's] administration of the pregnancy test violated a clearly established constitutional right, there is no record evidence to suggest that [the school nurse's] behavior was unreasonable, that [M.V.'s] decision was coerced, or that [the school nurse] threatened or intimidated [M.V.] into submitting to the test. [M.V.'s] subjective belief that she was required to be tested and her unsubstantiated speculation that a refusal could result in adverse consequences do not constitute competent summary judgment evidence.

Id. at *4. The 5th Circuit affirmed the federal district court's grant of summary judgment to the school nurse and the school district. However, the 5th Circuit (as did the 3rd Circuit in Gruenke) had a bit of advice for the school personnel.

Notwithstanding that [the school nurse] is entitled to qualified immunity, it is also plain that this controversy might have been averted had [the school nurse] or [the principal] convened a meeting with [M.V.'s] parents at the outset, rather than allowing them to learn after the fact about the pregnancy test and [the school nurse's] encouraging [M.V.] to go on birth control pills at the age of fifteen.

Id. at *5, n. 2.

Confidentiality and Privileged Communications

The 3rd Circuit in Gruenke, *supra*, criticized the actions of a number of school officials (besides the swim coach). One person in particular the Court singled out was the guidance counselor the swim coach approached and with whom he shared his suspicions.

In reviewing the record, one is struck by the fact that the guidance counselor, aware of the situation, apparently did not advise [the swim coach] to notify the

⁸⁵The court's decision referenced herein is the recommended decision of the federal magistrate. The federal district court, upon review, granted summary judgment to the school nurse as well as the school district.

parents. Nor did the counselor herself undertake that responsibility. Even the principal (himself a former guidance counselor), who did not become aware of the matter until late in the game, did not even comment that this was a matter for the parents and not school authorities. His reprimand to [the swim coach] did not mention the supremacy of the parents' interest in matters of this nature.

Id. at 306. The Court stopped short of establishing a duty to report.

We need not consider the potential liability of school counselors here, although we have considerable doubt about their right to withhold information of this nature from the parents. Because public school officials are state actors, they must not lose sight of the fact that their professional association ethical codes, as well as state statutes, must yield to the Constitution.

Id. at 307. The 3rd Circuit also referred to Arnold v. Board of Education, 880 F.2d 305 (11th Cir. 1989), where parents alleged that school officials coerced a student into having an abortion but urged her not to discuss the matter with her parents. In that case, the court held the school counselor interfered with the parents' right to direct the upbringing of their child. The *Arnold* court, however, did not hold that counselors are mandated by the constitution to notify parents when their minor child receives counseling about pregnancy, but nevertheless indicated, "as a matter of common sense," counselors should encourage communication. Arnold, 880 F.2d at 314.

One of the more perplexing problems—but one with surprisingly little judicial construction—is whether or under what circumstances school personnel should report to a parent the pregnancy of the parent's child when such information has been provided by the child to school personnel within a statutory privilege or professional code of conduct (such as a school social worker or guidance counselor).⁸⁶

What are the duties of school counselors when faced with such matters as student pregnancy? As the Gruenke court noted, ethical codes and state statutes may come into play, but it is the Constitution that is preeminent.

A typical statutory privilege of this sort reads as follows (borrowing from Indiana):

I.C. § 20-28-10-17 School Counselors; Privileged or Confidential Information

Sec. 17. (a) Except as provided in I.C. §31-32-11-1 [reporting of suspected child abuse or neglect], a school counselor is immune from disclosing privileged or confidential communication made to the counselor as a counselor by a student.

(b) Except as provided in I.C. §31-32-11-1, the matters communicated are privileged and protected against disclosure.

⁸⁶Most States would require the reporting to child welfare authorities of a student pregnancy where the student is under the age of consent for that particular state. Such a pregnancy could be the product of either statutory rape or incest.

In addition, the national organizations that some school personnel belong to have created their own rules for ethical or professional conduct. The National Association of Social Workers approved in 1996 (revised in 1999) an extensive “Code of Ethics” for its members that provides, in relevant part at **1.07 Privacy and Confidentiality** that social workers will respect the right to privacy of their clients, and that once private information is shared, standards of confidentiality will apply. There are eighteen (18) subparts to the privacy and confidentiality portion of this Code of Ethics.

Port Washington Teachers’ Association, et al. v. Board of Education of the Port Washington Union Free School District, et al., 478 F.3d 404 (2nd Circuit 2007) is a long-running dispute that began when the superintendent issued a one-page memorandum addressing the reporting by staff members of student pregnancies. The memorandum stated that such a student report is not a privileged communication and “may trigger legal reporting obligations. A staff member who became aware of a student pregnancy should report this to the school social worker.”

The social worker should encourage the student to voluntarily disclose her pregnancy to her parents and, if the student represents that she will inform her parents, confirm that such a disclosure was made. If the student refused to voluntarily inform her parents, the social worker should offer to meet with the parents and the student to help the student to inform her parents and/or offer to inform the student’s parents without the student being present. If the student continues to insist on keeping the information from her parents, the social worker should inform the student that she/he will inform the parents. After consultation with the Principal and Superintendent, the social worker should inform the parents.

478 F.3d at 497. The memorandum also advised staff to inform students that conversations about student pregnancies would not be confidential. Id.

In 2004, several teacher union organizations and the only social worker in the only high school in the school district brought suit on their behalf and on behalf of all high school female students, asserting the reporting requirements in the memorandum violated the constitutional rights of the students as well as Title IX, 20 U.S.C. § 1681, and would further require social workers to violate state statutes regarding privileged communications. Id. at 496-97. The federal district court denied the plaintiffs’ request for a preliminary injunction. Port Washington Teachers’ Association, et al. v. Bd. of Ed. of the Port Washington Union Free Sch. Dist., 361 F.Supp.2d 69 (E.D. N.Y. 2005). Later, the court granted the school defendants’ Motion to Dismiss, finding primarily that the plaintiffs lacked standing to raise these claims. Port Washington, 2006 U.S. Dist. LEXIS 1904 (E.D. N.Y. 2006).

A three-member panel of the United States Court of Appeals for the Second Circuit affirmed. The 2nd Circuit noted that the constitutional requirements for standing are found in Article III, limiting federal court jurisdiction to cases or controversies.⁸⁷ A “case or controversy” does not include hypothetical or abstract disputes. The facts alleged would have to demonstrate “a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to

⁸⁷U.S. Constitution, Art. III, § 2, cl. 1.

justify judicial resolution.” *Id.* at 501-02, quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510 (1941).

Standing has three elements:

- (1) There must be an “injury in fact,” an “invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical”;
- (2) There must be “a causal connection between the injury and the conduct complained of”; and
- (3) It “must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 498, quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992) (some internal punctuation and citations omitted).

This would be true especially in a case like this where the plaintiffs are asserting “third-party standing” by “attempting to resolve the rights of third parties who are not parties to the litigation but whose rights are likely to be diluted or adversely affected.” *Id.* (citations and other internal punctuation omitted).

Injury In Fact

The Plaintiffs argued they can demonstrate an “injury in fact,” the first element to establish standing, because compliance with the memorandum would require social workers to “risk civil liability and place their licensure in jeopardy” by violating their clients’ constitutional and statutory rights. Conversely, should social workers fail to abide by the memorandum, they could “face the threat of employer-initiated discipline and possible termination.” *Id.* at 499.

The 2nd Circuit was not convinced that such “imminent harm” was present. The panel acknowledged that New York law does provide that certain licensed social workers cannot be required to disclose a communication made by a client, and that a breach of this statutory privilege can be the basis for a tort claim; however, “the plaintiffs have not shown that there is imminent danger either that they will disclose confidential communications to parents, the principal or the superintendent, or that Port Washington students will bring suit against the plaintiffs seeking redress for any such disclosure.” *Id.* Any potential “professional discipline” for breaching confidentiality was likewise “speculative.” *Id.* n. 2. The court noted that student reaction to the memorandum has been to not report such occurrences. This, in turn, obviates any need on the part of school personnel to either report or decline to report “confidential information.” As a consequence, school personnel would face neither civil liability nor professional discipline. *Id.* That such liability or discipline might occur in the future “does not amount to injury in fact.” *Id.* at 500.

The plaintiffs face no repercussions as a result of the memorandum. At the district court level, the superintendent testified that the memorandum was not intended to be mandatory. It was an attempt to “clarify to help staff understand what procedures and what practices either have been in place or are now in place.” He added that he would not discipline a staff member who, pursuant to the staff member’s exercise of professional judgment, would decline to observe the parental notification advisory. *Id.*

In addition, the legal status of the memorandum reduces the threat of any actual or imminent harm. Under New York law, it is the school board that has the authority to devise rules and regulations for the conduct of the schools, not the superintendent. Also, the memorandum does not purport to enforce some aspect of state law or clarify any school board rule or regulation. Because the superintendent does not have the authority to promulgate a binding set of rules (and there appears to be no delegation of such authority), the memorandum would not be “legally binding on the plaintiffs, and cannot be enforced against them.” *Id.* at 500-01.

The 2nd Circuit also noted the language in the memorandum indicates its “non-mandatory” nature (the use of “should” throughout). *Id.* at 501. “We conclude that the plaintiffs have failed to demonstrate actual or imminent harm to themselves and, therefore, have failed to establish the injury in fact necessary to achieve standing.” *Id.*

The 2nd Circuit in Port Washington did not reach the core issue: whether a statutory privilege (as distinguished from a common law privilege, such as lawyer-client or physician-patient) or a code of conduct of a professional organization would serve to excuse licensed school personnel from reporting a student pregnancy to the student’s parent. It does not appear that any court, other than the 3rd Circuit in *dicta* in Gruenke, *supra*, has addressed that specific issue, even though this concern is ever present.

COURT JESTERS: POT LUCK

Dale Hudson, Sr., was a farmer. Unfortunately, he raised grass (and not the kind to mow). In 1982, Hudson drove his 1976 Ford pick-up truck out to the country to inspect his crop. He should have kept on truckin’.⁸⁸ Law enforcement personnel had his operation under surveillance. After he parked his truck by a shed and unloaded some roofing material, he floated on over to check on his pot plot. When he entered his fields, he was arrested and convicted for his criminal enterprise.

The government later sued under 21 U.S.C. § 881 to require Hudson to forfeit his truck because, the government said, the truck was used or was intended to be used in the furtherance of Hudson’s illegal activities. In United States v. One 1976 Ford F-150 Pick-Up Truck, 599 F.Supp. 818 (E.D. Mo. 1984), the federal district court read Hudson chapter and verse. (Well, actually, the court just read him verse, but plenty of it.)

Judge H. Kenneth Wangelin provided a brief procedural history.

The defendant herein is a truck,
The vehicle type is a pick-up,
Alleged by a Fed
To be found in a bed
Of marijuana, caught in the muck.

⁸⁸“Keep On Truckin’” is the popular drawing and saying from the late 1960s and 1970s. This was the creation of R. (Robert) Crumb, famed American artist and illustrator (especially for underground comics, album covers, and other counter-cultural publications). Crumb also drew Fritz the Cat and Mr. Natural.

On August 16, '82
In Perry County, Missouri, who
Should appear
But claimant Hudson with gear
As a one-man pot-tending crew.

Claimant drove defendant that day
With tools to care for his
 Illegal hay.
He was observed by the Fed
placing metal by a shed
Where other tools of his trade would stay.

Id. Hudson would not go quietly. He acknowledged that he drove his pick-up truck that date, but the truck was not used for any purpose other than to transport roofing material. He argued there was no evidence of any intent to use the truck for any illegal purpose.

Claimant now wants his truck back
And he based his legal attack
On the grounds that defendant,
Though found in pot fields resplendent,
Was not used as an illegal hack.

Id. The federal district court, relying upon U.S. v. One 1974 Cadillac El Dorado Sedan, 548 F.2d 421 (2nd Cir. 1977), was not swayed by Hudson's argument, noting that under Cadillac, the use of the truck facilitated other illegal activity and that was sufficient to forfeit the truck to the government.

Thus the *Cadillac* case this Court will follow,
Renders claimant's contention hard to swallow,
And the Court will now render
Judgment Against the defender
Because claimant's contentions are hollow.

Now the moral in this case 'bout the truck
Is easy, in case you are stuck,
If in an illegal endeavor
A vehicle is used whatsoever,
Then, my friend, you are clear out of luck

Id. at 819. Hudson wasn't so "clear out of luck" as the court supposed. He was able to re-hash his dispute at the next level. The 8th Circuit reversed the judgment for the government, but without any of the poetic flair the federal district court displayed. U.S. v. One 1976 Ford F-150 Pick-Up, 769 F.2d 525 (8th Cir. 1985).

QUOTABLE . . .

Useless laws diminish the authority of necessary ones.

Jesse C. Hart, Associate Justice, Arkansas Supreme Court, in Pugsley v. Sellmeyer, et al., 250 S.W. 538, 540 (Ark. 1923) (dissenting, relying upon “the wisdom of this old proverb” to castigate the majority for upholding a dress code policy that prevented an 18-year-old high school girl from wearing talcum powder on her face, a rule Justice Hart considered manifestly unreasonable).

UPDATES

Surveys and Privacy Rights

Surveys play a significant role in gauging attitudes or assumptions of certain demographics, as well as identifying the extent to which certain behaviors occur, including behaviors that may be illegal. While there is little concern about the employment of such surveys with an adult population, Congress and state legislatures have found it necessary to enact laws designed to protect minor students from disclosing certain information without the informed consent of the students’ parents or guardians.⁸⁹ “Informed consent,” courts have found, means “active consent.” See, e.g., C.N. v. Ridgewood Board of Education, 430 F.3d 159 (3rd Cir. 2005).

The Protection of Pupil Right Amendment (PPRA), 20 U.S.C. § 1232h, 34 C.F.R. Part 98, is the federal law that affords certain rights to parents of minor student with regard to surveys that inquire of areas of a personal nature. The federal law requires schools to obtain written consent from parents before the parents’ minor children are required to participate in any survey, analysis, or evaluation funded by the U.S. Department of Education that would reveal certain information such as political affiliations, mental and psychological problems, sexual behavior and attitudes, illegal activity, familial relationships, privileged relationships, religious beliefs, or family income (with some exceptions for this latter category).

Because the PPRA is limited to a survey, analysis, or evaluation that is funded at least in part through the U.S. Department of Education, state legislatures have crafted similar laws. Indiana passed such a law in 1995.

I.C. §20-30-5-17 Access to Materials Relating to Personal Analysis, Evaluation, or Survey of Students; Consent for Participation

(b) A student shall not be required to participate in a personal analysis, an evaluation, or a survey that is not directly related to academic instruction and that reveals or attempts to

⁸⁹See “Surveys and Privacy Rights: Analysis of State and Federal Laws,” **Quarterly Report** October-December: 2005.

affect the student's attitudes, habits, traits, opinions, beliefs, or feelings concerning:

- (1) political affiliations;
- (2) religious beliefs or practices;
- (3) mental or psychological conditions that may embarrass the student or the student's family;
- (4) sexual behavior or attitudes;
- (5) illegal, antisocial, self-incriminating, or demeaning behavior;
- (6) critical appraisals of other individuals with whom the student has a close family relationship;
- (7) legally recognized privileged or confidential relationships, including a relationship with a lawyer, minister, or physician; or
- (8) income (except as required by law to determine eligibility for participation in a program or for receiving financial assistance under a program);

without the prior consent of the student if the student is an adult or an emancipated minor or the prior written consent of the student's parent if the student is an unemancipated minor. A parental consent form for a personal analysis, an evaluation, or a survey described in this section shall accurately reflect the contents and nature of the personal analysis, evaluation, or survey.

* * *

There have been several disputes in recent years over the use of surveys by school corporations seeking to discern student attitudes and behaviors regarding sexual activity and potential drug use. In addition, several other school districts began to employ a mental health survey that purported to identify students who may have obsessive-compulsive or social anxiety disorders. In the attitude and behavior survey, initially the school district did not seek "active consent" of the parents. In the mental health survey, the school district allegedly did not seek consent at all. Eventually, the school districts did begin to obtain "active consent" of the parents or guardians before minor students completed the surveys.

Recent legislation by the Indiana General Assembly has raised concerns that students might be subjected to similar surveys. During the 2005 session, the legislature created the Children's Social, Emotional, and Behavioral Health Plan, I.C. § 20-19-5 *et seq.* The general concept is that the Indiana Department of Education, in cooperation with the Department of Child Services, the Division of Mental Health, and the Department of Correction, will develop the Children's Social, Emotional, and Behavioral Health Plan that would, *inter alia*, provide recommendations concerning comprehensive mental health services, early intervention services, or treatment services for individuals from birth through 22 years of age. This Health Plan could have broad applications. Some of the anticipated recommendations include:

I.C. § 20-19-5-2 Plan Recommendations

Sec. 2. The children's social, emotional, and behavioral health plan shall recommend:

- (1) procedures for the identification and assessment of social, emotional, and mental health issues;
- (2) procedures to assist a child and the child's family in obtaining necessary services to treat social, emotional, and mental health issues;
- (3) procedures to coordinate provider services and interagency referral networks for an individual from birth through twenty-two (22) years of age;

- (4) guidelines for incorporating social, emotional, and behavioral development into school learning standards and education programs;
- (5) that social, emotional, and mental health screening be included as a part of routine examinations in schools and by health care providers; ...
- (7) plans for creating a children's social, emotional, and behavioral health system with shared accountability among state agencies that will:
 - (A) conduct ongoing needs assessments;
 - (B) use outcome indicators and benchmarks to measure progress; and
 - (C) implement quality data tracking and reporting systems; ...
- (12) how to facilitate research on best practices and model programs for children's social, emotional, and behavioral health; ...
- (14) how to implement a public awareness campaign to:
 - (A) reduce the stigma of mental illness; and
 - (B) educate individuals:
 - (i) about the benefits of children's social, emotional, and behavioral development; and
 - (ii) how to access children's social, emotional, and behavioral development services.

One of the first issues to resolve was to allay concerns that the Social, Emotional, and Behavioral Health Plan would be administered to students without first obtaining the informed consent of the parents of minor students. The Interagency Task Force stressed this in its report.⁹⁰ Such surveys or screenings have been a source of concern. A case that predates the PPRA's passage in 1974 but is still relevant today is Merriken, et al. v. Cressman, et al., 364 F.Supp. 913 (E.D. Pa. 1973).

The school district, in concert with a private company, instituted a program for its eighth graders called "Critical Period of Intervention" (CPI), which was suppose to be a drug-prevention initiative. Students and teachers were required to complete questionnaires that asked personal questions about such matters as the family religion, race or skin color, family composition (including reasons why one or both parents were absent), and family interactions. In addition, students and teachers were asked to identity other students in the class who made unusual or odd remarks, get into fights, or engage in other perceived anti-social behaviors. Merriken refused to participate and eventually filed suit. Prior to the initiation of the suit, the school district did not obtain the affirmative consent of parents in order for their minor children to participate. The school district construed a parent's silence as acquiescence. After the suit was filed, the school district switched to affirmative written parental consent. Id. at 914-16.

Prior to the suit, no student consent was sought. Students were expected to participate. After the lawsuit was filed, students were permitted to return blank questionnaires. Id. at 914-15. There were also concerns about confidentiality. The questionnaires were intended to generate a "massive data bank" from which specific findings on certain students would be disseminated to various school personnel, including athletic coaches, as well as school board members and PTA officers. There were no guarantees that the data generated from the questionnaires could not be accessed by law enforcement authorities outside the school district. Id. at 916. A student identified as being "at risk" of these behaviors was subject to "remediation" or "intervention" that included "Guided Group Interaction" activities, "involuntary assignment," or "Referral Intervention, the latter one

⁹⁰The report is available at <http://doe.state.in.us/exceptional/TaskForce.html> (last visited August 24, 2007).

involving “community resources such as clinics, hospitals, rehabilitation center, etc., to help the seriously disturbed or serious drug-user student.” Another form of intervention was called the “Adult Role Model,” where teachers selected two children from a list of “identified emotionally handicapped children.” The teachers would then be given background information on each child. Teachers received very little information or instruction on how to guide, direct, or implement the various interventions or remediation efforts. Id. at 916-17. Parents could not obtain a copy of CPI Program results unless the parents affirmatively requested them. Id. at 917.

Two child psychiatrists testified that the CPI Program contained certain “dangerous aspects,” none of which were referred to in materials from the publisher of the CPI Program even though the publisher was aware of these negative aspects. One of these areas involved “self-fulfilling prophecy” where “a child labeled as a potential drug abuser will by virtue of the label decide to be that which people already think that he or she is anyway.” Id. at 915. There is also the problem of “scapegoating” where “a child might be marked out by his peers for unpleasant treatment either because of refusal to take the CPI test or because of the results of the test.”⁹¹ Id.

The CPI Program claimed its questionnaire and procedures were designed to help school districts identify “potential drug abusers,” a concept it nowhere defines. It claims to “identify patterns similar to marijuana, LSD, barbiturate or amphetamine user,” but there is no reference to “such drugs as cigarettes, alcohol, opium, heroin or cocaine. Moreover, there no statement as to what constitutes abuse.” Id.

Although the student and his parents filed suit claiming violations of freedom of religion, speech, and assembly, along with privileges against self-incrimination, the overall thrust of the complaint was an invasion of privacy. The court noted “the highly personal nature of the entire questionnaire,” adding “[t]hese questions go directly to an individual’s family relationship and his rearing. There probably is no more private a relationship, excepting marriage, which the Constitution safeguards than that between parent and child. This Court can look upon any invasion of that relationship as a direct violation of one’s Constitutional right to privacy.” Id. at 918. The court added that “the right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech.” Id.

Because the Constitutional rights of minors were implicated, such rights could not be waived by their parents or guardians without being fully informed of the implications. “Waivers of constitutional right not only must be voluntary but must be knowing, intelligent and done with sufficient awareness of the relevant circumstances and likely consequences.” Id. at 919, quoting Brady v. U.S., 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1969). In this case, the publisher’s materials were more interested in “selling” the parents on the CPI Program than informing them of the potential negative consequences. The materials “gave only one side of the test picture” to the parents. Id. The court found this approach “far from candid” such that parents were “not aware of the consequences.” Id. at 920. “[T]here is no substitute for candor and honesty in fact, particularly by the school board who, as the ultimate decision-maker as far as education of our

⁹¹This was no mere hypothetical, the court pointed out. The plaintiff’s mother would not permit him to complete the questionnaire. Other students then accused him of being a drug user. Id. at 915.

children is concerned, should give our citizenry a more forthright approach.” *Id.* The lack of candor prevented the parents from having “the opportunity to give knowing, intelligent and aware consent.” *Id.*

Aside from the lack of informed consent, the “actual testing of the students and the results gained are suspect.” *Id.* The limited scope, the lack of definitions for critical criteria, and the lack of training of school personnel for remediation and intervention purposes undermine the credibility of the program. “How many children would be labeled as potential drug abusers who in actuality are not, and would be subjected to the problem of group therapy sessions conducted by inexperienced individuals?” *Id.* In addition, the lack of strict confidentiality exacerbates the harm to the students.

[T]here are many opportunities for a child to suffer insurmountable harm from a labeling such as “drug abuser” at an age when the cruelty of other children is at an extreme. The seriousness of this problem is illustrated by the fact that if one child is so harmed and would be temporarily or permanently damaged by the label of “drug abuser,” is this Program worth the effort to identify other actual “drug abusers”?

Id. When placing a label on a child that could remain with the child for the rest of his life, “the margin of error must be almost nil.” *Id.* Although there is a balancing test employed where an individual’s privacy interest may have to give way to a compelling public need, the scales tip in favor of the individual’s privacy in this case. Drug prevention and intervention are compelling public interests. However, the CPI Program is significantly lacking in “authenticity and credibility” such that “[t]here is too much of a chance that the wrong people for the wrong reasons will be singled out and counseled in the wrong manner.” *Id.* at 921. “As the Program now stands, the individual loses more than society can gain in its fight against drugs. The Court will enjoin this Program as it fails to meet Constitutional standards.” *Id.*

The Out-of-State Attorney

The Individuals with Disabilities Education Act (IDEA) permits a court, in its discretion, to award attorney fees to parents who prevail in administrative and judicial proceedings under the Act. 20 U.S.C. § 1415(i)(3)(B). A question courts have wrestled with is whether parents are entitled to recover attorney fees where their attorney was not licensed in the state or jurisdiction where the IDEA proceeding occurred.⁹² The District of Columbia has agreed with other jurisdictions that have addressed this issue, finding that parents are not entitled to attorney fees where their attorneys are not licensed or otherwise authorized to practice law in a state or jurisdiction.

Agapito, et al. v. District of Columbia, 477 F.Supp.2d 103 (D. D.C. 2007) involves the parents or guardians of 54 students who assert that they prevailed in administrative due process hearings against the District of Columbia Public Schools (DCPS) and are entitled to attorney fees. The law firm that represented the students and their parents or guardians sent 88 invoices to the DCPS.

⁹²See “The Out-of-State Attorney,” **Quarterly Report** July-September: 2004 (Update).

DCPS noted that many of the firm's attorneys who represented the students either were not licensed to practice law in the District of Columbia, became licensed after the conclusion of the hearings, or were still not licensed to practice in this jurisdiction. DCPS returned the 88 invoices, adding that payment was "denied...due to the unauthorized practice of law." 477 F.Supp.2d at 106-07.

The District of Columbia Court of Appeals Committee on Unauthorized Practice of Law weighed in, issuing a letter concluding that "attorneys who are not admitted to the D.C. Bar may not engage in the practice of law in administrative proceedings before DCPS." *Id.* at 107. The plaintiffs then filed suit, seeking to recover their attorney fees.

While local rule prohibits the unauthorized practice of law by one who is not an active member of the D.C. Bar, there are some exceptions, such as where a statute authorizes such representation or the D.C. agency or department authorizes unlicensed representation by rule and undertakes to regulate representation. The court found that no exception existed in this case. There is no statute authorizing attorneys not licensed by the D.C. Bar to represent clients before DCPS hearing officers. Additionally, DCPS has never authorized such representation or sought to regulate such activities. *Id.* at 108. Even though DCPS may have permitted unlicensed attorneys to represent parents in IDEA administrative hearings in the past, this did not create a "de facto" rule or regulation. DCPS's current policy is unequivocal that attorneys not admitted to the D.C. Bar are disqualified from representing parties in IDEA proceedings before DCPS hearing officers. *Id.* at 109.

Local rule also allows an attorney not licensed to practice law in D.C. to do so for a limited time while under the supervision of a D.C.-licensed attorney. One non-licensed attorney actively participated in a number of administrative hearings, presenting cases and entering into settlement agreements on behalf of students and their parents or guardians. Although he was not directly supervised by a D.C.-licensed attorney, his work was reviewed by a properly licensed attorney, who also discussed strategy and provided guidance. The court found this was permissible under the local rule. *Id.* at 109-11.

The court relied upon two analogous cases from the U.S. Ninth Circuit Court of Appeals to decide whether the parents may recover attorney fees for the work performed by their non-licensed attorneys. In Z.A. v. San Bruno Park School District, 165 F.3d 1273 (9th Cir. 1999), the 9th Circuit found that "no person may recover compensation for services as an attorney in California unless he or she was a member of the state bar at the time the services were rendered." Such a person could appear as a "lay advisor," but he could not charge or collect fees for services as an attorney. 165 F.3d at 1275-76. In a later decision, the 9th Circuit applied its Z.A. decision to an Arizona dispute. Shapiro v. Paradise Valley Unified School District, 374 F.3d 857 (9th Cir. 2004). Agapito, 477 F.Supp.2d 111-12.⁹³

⁹³Indiana has an unpublished decision that reaches this same conclusion. In Nathan C. v. School City of Hobart, 30 IDELR 396 (N.D. Ind. 1999), an attorney licensed in Illinois and Missouri represented two families in separate IDEA hearings in Indiana. The lawyer was not licensed to practice law in Indiana and had not sought temporary approval to do so (*pro hac vice*). The court found that an attorney not admitted to practice law in Indiana may not recover for services rendered in Indiana. Such an attorney could act as a lay advocate, but such costs are not reimbursable under the IDEA.

The District of Columbia does have case law that indicates non-licensed attorneys cannot generate legal fees for representation in the district, although the case law does not arise out of an IDEA proceeding. In Finch v. Finch, 378 A.2d 1092 (D.C. 1977), a divorce dispute, the court found that an attorney may not be awarded attorney fees for legal services rendered while unlicensed in the District of Columbia. “Here, under *Finch*, the Court need only determine whether Plaintiffs’ attorneys did, in fact, engage in the authorized practice of law.” Id. at 112-14.

In this case, the court found that most of the attorney fees sought by the plaintiffs were not recoverable because their attorneys were not licensed to practice law in the District of Columbia or failed to meet one of the exceptions delineated in the local rule governing the authorized practice of law.

Date: January 15, 2008

/s/Kevin C. McDowell

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The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at www.doe.in.gov/legal.

Policy Notification Statement

It is the policy of the Indiana Department of Education not to discriminate on the basis of race, color, religion, sex, national origin, age, or disability, in its programs, activities, or employment policies as required by the Indiana Civil Rights Law (I.C. § 22-9-1), Title VI and VII (Civil Rights Act of 1964), the Equal Pay Act of 1973, Title IX (Educational Amendments), Section 504 (Rehabilitation Act of 1973), and the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*).

Inquiries regarding compliance by the Indiana Department of Education with Title IX and other civil rights laws may be directed to the Human Resources Director, Indiana Department of Education, Room 229, State House, Indianapolis, IN 46204-2798, or by telephone to 317-232-6610, or the Director of the Office for Civil Rights, U.S. Department of Education, 111 North Canal Street, Suite 1053, Chicago, IL 60606-7204

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